SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 963.

HENRY A. WISE, PLAINTIFF IN ERROR,

vs.

LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, AND EMIL S. DUFLOT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Petition for writ of error	1	1
Writ of error	2	1
Clerk's certificate	3	2
Order to show cause	6	2
Petition	7	2
Affidavit of Henry A. Wise	10	4
Exhibit A.—Affidavit of John M. Williams	17	8
B.—Bench warrant	19	9
C.—Letter, Feb. 5, 1909	21	10
Opinion, Lacombe, C. J.	24	11
Order to return books, etc	29	14
Statement of grounds of United States attorney's refusal to obey order	31	15
Exhibit A.—Affidavit of John M. Williams	39	19
B.—Bench warrant	41	20
C.—Letter, Feb. 5, 1909	43	21
D.—List of books and papers	46	22
Affidavit of Lawrence H. Mills	48	23
Order of commitment	50	24
Assignment of errors	52	25
Supersedeas	54	25
Citation	55	26

Petition for writ of error.

Circuit Court of the United States, Southern District of New York.

IN THE MATTER OF AN ALLEGED CONTEMPT OF COURT BY HENRY A. WISE, UNITED STATES ATTORNEY.

Now comes Henry A. Wise, United States attorney for the Southern District of New York, and feeling aggrieved by the order of this court made on the 15th day of March, 1911, ordering and adjudging him to be in contempt of court,

Petitions this court for an allowance of a writ of error and for such other process as may cause the aforesaid order to be corrected by the Supreme Court of the United States.

Dated New York, March 15, 1911.

HENRY A. WISE,
United States Attorney for the Southern District of New York.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, March 15th, 1911. Everett, Clarke, Benedict & Ward, attorneys for petitioners.—U. S. Circuit Court, Southern District N. Y. Filed Mar. 15, 1911. John A. Shields, Clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court before you, or some of you, in the matter of an alleged contempt of court by Henry A. Wise, United States attorney for the Southern District of New York, a manifest error hath happened to the great damage of the said Henry A. Wise, as is said and appears by his complaint,

We being willing that such error, if any hath been, should be duly corrected and full and speedy justice done, do command you, if judgment be therein given, that there under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capitol in the city of Washington, District of Columbia, together with this writ, so that you have the same at the said place before the justices aforesaid on the 15th day of April, 1911, that the record and proceedings aforesaid being executed, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the custom of the United States ought to be done.

3 Witness the Hon. Edwin D. White, Chief Justice of the Supreme Court of the United States this 15th day of March, in

the year of our Lord one thousand nine hundred and eleven, and of the independence of the United States the one hundred and thirty-fifth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York in the Second Circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the pages numbered from one to fifty-six, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause entitled In the matter of an alleged contempt of court by Henry A. Wise, U. S. attorney, as the same remain of record and on file in said office.

4 In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern District of New York, in the Second Circuit, this 20th day of March, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

6 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA,
against
LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, and Emil S. Duflot, defendants.

Upon reading the annexed petition of the defendants, verified February 23rd, 1911, and upon motion of Everett, Clarke, Benedict & Ward, attorneys for the defendants, let the United States marshal and the district attorney show cause before this court at the call of the motion calendar on the 24th day of February next, at 10½ o'clock a. m., or as soon thereafter as counsel can be heard, why the books and papers mentioned in the annexed petition should not be immediately surrendered to said defendants; and it is.

Service of this order on the United States marshal and the district attorney on or before February 23, 1911, at 1 o'clock p. m., shall be sufficient.

Dated February 23, 1911.

GEO. C. HOLT, *J.*

7 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA,
against
LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, and EMIL S. DUFLOT, defendants.

To the Honorable the Judges of the United States Circuit Court for the Southern District of New York:

The petition of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot respectfully shows:

First. That they are copartners trading at No. 465 Broome Street, in the Borough of Manhattan, the city of New York, as importers of laces, silks, and veilings and other dry goods, and have been so employed for the four years last past.

Second. That on the 20th day of February, 1911, certain servants and agents of the Department of Justice, accompanied by one William Henkel, United States marshal for the Southern District of New York, with his servants and deputies, unlawfully and without warrant or authority seized and carried away, against the will of the petitioners above named, a large quantity of books and
8 papers, the exact number and description of which petitioners are unable to specify, at petitioners' said premises, No. 465 Broome Street, which books and papers are the property of the petitioners, as copartners as aforesaid, and constitute substantially all the books and papers with which they are and have been for several years doing business.

Third. Upon information and belief that said books and papers were taken by said agents and servants of the Department of Justice and said Henkle to the United States courthouse and post-office building, in the Southern District of New York, and there given to or placed at the disposal of the Federal grand jury and of the United States district attorney for the Southern District of New York for examination by them.

Wherefore petitioners pray that an order be issued, directed to said marshal and to the district attorney, to show cause why said books should not be immediately surrendered to petitioners and why said marshal and his deputies and the district attorney should not in the meantime be restrained from permitting their inspection by any person except the petitioners.

And your petitioners will ever pray.

LAWRENCE H. MILLS,
CHARLES G. MOURRAILLE,
EMIL S. DUFLOT,
Petitioners.

By LAWRENCE H. MILLS.
EVERETT, CLARKE, BENEDICT & WARD,
Attys. for Defendants.

9 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Lawrence H. Mills, being duly sworn, deposes and says: That he is one of the petitioners above-named; that he has read the foregoing petition and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

LAWRENCE H. MILLS.

Sworn to before me this twenty-third day of February, 1911.

[SEAL.] W. E. HANNA,
Notary Public, Kings Co.
Cert. filed in New York Co.

Due service of within is hereby admitted this 23rd day of February, 1911, at 11.45 a. m.

HENRY A. WISE,
U. S. Attorney, S. D. N. Y.

U. S. CIRCUIT COURT,
Southern District N. Y.
Filed Mar. 7, 1911. JOHN A. SHIELDS, *Clerk.*

10 *Affidavit of Henry A. Wise.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
versus
LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, AND Emil S. Duflot.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry A Wise, being duly sworn, deposes and says: I am the United States attorney for the Southern District of New York, and have read the petition of the above named defendants verified on the 23rd day of February, 1911, by Lawrence H. Mills, wherein it is stated and alleged that on the 20th day of February, 1911, certain special agents of the Department of Justice, accompanied by the United States marshal for the Southern District of New York, unlawfully and without warrant or authority seized and carried away a large quantity of books and papers, property of the said defendants, from the premises No. 465 Broome street, in the city of New York. For the information of this court deponent further says on information and belief as follows:

That on the 20th day of February, 1911, complaint was duly made under oath before John A. Shields, one of the United States commissioners for the southern district of New York, by John M. Williams, inspector of customs of the United States, charging the said

Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot
11 with the crime of conspiracy to defraud the United States of lawful money due and to become due to the United States as a portion of the customs duties upon certain merchandise imported into the United States from a foreign country; that annexed hereto and made a part hereof and marked "Exhibit A" is a true copy of the said complaint. That thereafter the said John A. Shields duly issued his warrant of arrest, which said warrant was delivered to the United States marshal for the Southern District of New York, who thereupon deputized one Edward J. Brennan, who is also a special agent of the Department of Justice, to execute the said warrant; that annexed hereto and made a part hereof and marked "Exhibit B" is a true copy of the said warrant. That thereafter and on the said 20th day of February, 1911, the said Edward J. Brennan, together with certain other agents and employees of the Department of Justice, and together with the said John M. Williams, inspector of customs as aforesaid, duly proceeded to the premises known as No. 465 Broome Street, in the city of New York, and thereafter, under and by virtue of the authority of the said warrant of arrest, duly and in accordance with law placed the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, the above named defendants, under arrest, and duly conveyed them to the United States court and post office building.

That at the time of making the said arrest the said Edward J. Brennan and the said other agents and employees of the
12 United States did duly and in manner and form authorized by law take into their custody and possession certain books and papers which were and are and do contain evidence of the commission of a crime against the United States by the said defendants, by reason of the commission of which crime said defendants were lawfully apprehended as aforesaid; that the said books and papers were thereupon taken by the said Edward J. Brennan to the United States court and post-office building and were delivered into the lawful custody and possession of this deponent and now are in the official custody and possession of this deponent.

Deponent further says that on the said 20th day of February, 1911, complaint was made before the grand jury of the United States for this district that the said defendants were and had been for some time engaged in the persistent practice of defrauding the United States out of a portion of its revenue due as customs duties upon merchandise imported into the United States from a foreign country by the said defendants; that evidence touching and concerning the said alleged violations of the United States criminal laws relating to the collection of customs and other laws was adduced before the said grand jury, which duly found an indictment against the said defendants; that the said indictment was returned into court on the said 20th day of February, 1911, and a bench warrant duly issued thereon; that the said defendants were thereupon duly

taken into custody by the United States marshal for the Southern District of New York upon the said bench warrant, and on the said 20th day of February, 1911, were duly arraigned upon
13 the said indictment and held by the court to bail to answer the same; that the said Lawrence H. Mills and the said Charles G. Mourraille were held in the sum of seventy-five hundred dollars each and the said Emil S. Duflot was held in the sum of twelve thousand dollars.

At the time of the arrest of the defendants and down to this date, the grand jury has been engaged in the investigation of the fraudulent practices of said defendants in respect to the customs; which said investigation has continued since the filing of the indictment herein, and at the time of the service of the order to show cause herein deponent was about to present to the grand jury the books and papers as evidence of further offences, as to which he is prepared to advise the grand jury that further indictments, charging additional offences than those contained in the indictment already found, could be found.

Deponent further says that on the 23rd day of February, 1911, the said Lawrence H. Mills, together with A. Leo Everett, one of the attorneys of the said defendants, made an examination of the said books and papers and selected and set apart therefrom all of the same which relate to and concern the current transactions of the said defendants in their business; that this deponent thereupon voluntarily surrendered and returned to the said Lawrence H. Mills all of the said papers so selected and set apart relating to the current business of the said defendants, together with certain other books and papers which were in the possession of this deponent and did not relate to or concern the charges of crime now pending in this
14 court against said defendants and before the grand jury of this court against the said defendants.

Deponent further says that all of the books and papers which were taken into the possession of the said arresting officers as above stated and now remain in the possession of this deponent are and contain competent and relevant evidence of the commission of offences against the customs laws of the United States by the said defendants and each of them, and reasonably bear upon and relate to the said charges of crime now pending against the said defendant as aforesaid, and are and will be in all reasonable probability necessary to the proof of the said crimes upon the trial of the said defendant therefor; that the said books and papers will be diligently and expeditiously investigated and examined by this deponent, and in the event that any other part thereof seems to this deponent not to relate to the said charges against the said defendants or not to be necessary to the proof thereof, this deponent will voluntarily surrender and return the same to the said defendants.

Broadly speaking the crimes of fraud charged against the defendants which were the basis of the complaint upon which the commis-

sioner's warrant was issued, upon which one indictment has already been found, and which are the basis upon which the further investigation before the grand jury is proceeding, were accomplished and were conspired to be accomplished by means of consular invoices, which fraudulently understated the true purchase price of articles fraudulently imported, and private invoices which surreptitiously stated the true purchase price of such articles; and these two sets of invoices or copies thereof, which constitute the very instruments of the crimes charged against the defendants, are among the books and papers which were taken at the time of the arrest of the defendants and are now retained for the necessary purpose of the prosecution in my official custody.

Deponent further says that all of the said papers and documents in the possession of deponent are and will be at all times accessible to the said defendants within such reasonable limits as the necessities of the Government in the preparation of its case for trial impose.

Deponent further says that in no event will the papers referred to as being in the possession of this deponent be longer detained by this deponent than the demands of justice reasonably require.

Deponent further says that he has probable cause to believe and does in truth and in fact verily believe that the said defendants and each of them are guilty of the offences with which they are charged in the said indictment and of other and further offences in violation of the laws of the United States; that this deponent is in possession of a certain letter (hereto annexed as "Exhibit C"), written by Emil S. Duflot, one of the said defendants, in which the said Duflot instructs his agents and representatives in Paris as to the manner and form in which said agents should undervalue the merchandise which was then and there being imported into the United States by the said defendants; that on the said 20th day of February, 1911, the said Emil S. Duflot did admit to the said John M. Williams, prior to the time of his said arrest as above stated, that he had written the said letter and that the same was signed by him; that the books and papers now in the possession of this deponent set forth and establish the details of the practice adopted by the said defendants in their scheme to defraud the United States of a portion of its customs duties upon the said imported merchandise.

That the sources of deponent's information and the grounds of his belief are official investigations of this deponent and statements made to this deponent by his duly authorized and appointed assistants and by the said John M. Williams.

HENRY A. WISE.

Subscribed and sworn to before me this 4th day of March, 1911.

[SEAL.] FREDERICK D. CAMPBELL,
Notary Public, Kings Co., Cert. filed in N. Y. Co.

17 EXHIBIT A.

Before John A. Shields, U. S. Commissioner, Southern District of New York.

UNITED STATES *vs.* LAWRENCE H. MILLS, CHARLES G. Mourraille, Emil S. Duflot.	Conspiracy to defraud the United States. Sec. 544, U. S. R. S.; sec. 9, customs administrative act.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John M. Williams, being duly sworn, deposes and says: I am an inspector of customs of the United States at the port and collection district of New York.

Upon information and belief, I say that on the first day of October, 1909, at the city and county of New York and within the jurisdiction of this court, Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot did unlawfully, willfully, knowingly, and feloniously conspire with each other and with divers other persons unknown, to defraud the United States of lawful money due and thereafter to become due to the United States as a portion of the customs duties upon certain merchandise subject to duty by law, imported into the United States from a foreign country, to wit, France, by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, who were engaged in business in the said city and county of New York under the name and style of "Mills and Duflot;" that the object of said conspiracy was to be effected by presenting to the collector of customs at the port of New York fraudulent and false invoices,

18 affidavits, statements and declarations in connection with and relating to the said imported merchandise which was to be thereafter entered into the commerce of the United States at the said port of New York.

That to effect the object of the said conspiracy and pursuant thereto, said Lawrence H. Mills, on the 3rd day of December, 1909, subscribed and made a declaration of owner forming a part of and contained in a certain written entry of imported merchandise presented to the collector of customs at the port of New York by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, under and by the name and style of "Mills & Duflot," which said written entry referred to and embraced one case of veilings theretofore imported from a foreign country, to wit, France, on the 3rd day of December, 1909, in the steamship "Adriatic" and marked "P (R) R 173," and was given the serial number 304243 by the said collector of customs.

The sources of my information and the ground of my belief as to the facts herein recited are the official records remaining on file in the office of the said collector of customs and documentary evidence

in relation thereto and statements made by witnesses whose names cannot now be disclosed without impeding the administration of justice, but who can be produced at the proper times and places.

JOHN M. WILLIAMS.

Subscribed and sworn to before me this 18th day of February, 1911.

[SEAL.] JOHN A. SHIELDS, *U. S. Commr.*

19

EXHIBIT B.

To the marshal of the United States for the Southern District of New York and to his deputies, or any or either of them:

Whereas, at a circuit court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the Borough of Manhattan, in the city of New York, within and for the district and circuit aforesaid, on the 20th of February, in the year of our Lord one thousand nine hundred and eleven, the grand jurors in and for the said district and circuit brought into the said court a true bill of indictment against Lawrence H. Mills, Charles G. Mcurraille, and Emil S. Duflot for having, on the 3rd day of December, 1906, at the Southern District of New York and within the jurisdiction of this court, imported certain merchandise subject to the payment of duty by law from a foreign country, to wit, France, said merchandise being consigned to the said defendants under the name and style of "Mills & Duflot," and consisting of certain veiling contained in a case marked "P P. 173," whereby the United States was deprived of a portion of the lawful duties accruing upon the said merchandise by means of a false and fraudulent invoice; against the peace of the United States and their dignity and contrary to the form of the statute of the United States
20 in such case made and provided, as by said indictment, now remaining on file and of record in the said court, may more fully appear; to which indictment the said Lawrence H. Mills, Charles G. Mourraille & Emils S. Duflot have not yet appeared or pleaded.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Lawrence H. Mills, Charles G. Mourraille, & Emil S. Duflot and then bring before the said court at the U. S. court and post-office building, in the city of New York, to answer the indictment aforesaid.

Witness the Honorable Edward D. White, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, the 20th day of Feby., in the year of our Lord one thousand nine hundred and eleven.

HENRY A. WISE,
U. S. Attorney.
JOHN A. SHIELDS, *Clerk.*

21 EXHIBIT C.

L. H. MILLS. B. S. DUFLOT. C. G. MOURRAILLE.

MILLS & DUFLOT,
CHIFFONS, NETTINGS, JAPANESE AND EUROPEAN SILKS,
469–471 Broome Street.

NEW YORK, *February 5, 1909.*

Mr. P. RAVIER,
Paris, France.

DEAR SIR: We confirm exchange of cable.

Regarding your inquiry about Martin, we wired you to ship what you have in stock, and hope they will go forward at once. You might bear in mind that orders placed in October and November and which are not in New York by the first of February are always liable to be cancelled. If our customers have not the goods to show when the trade is in town, they are unable to sell until the following season.

Doning: We confirmed the order at 1 fr. 15, which is more than we wanted to pay. You have the shades, and you may ship them in lots of about 25 pieces as they come off the loom. We enclose herewith confirmation.

Tosca nets: We reordered Qual. 271/1286. We used two words on this quality number instead of one, and this is very apt to cause complication.

We added that you should send us new samples in a small "reseau," and received your answer that you did not understand what it meant. If you had looked at the code, you would have seen that "label" means to "send more samples." You have a code, and we should like to use it as much as possible. As you write in English,
22 we thought you would understand what "smaller" meant.

Consequently we wired you back last night in plain language. We are preparing another code which is very extensive, but we are so busy taking and filling orders that we have no time to finish it.

Rolandbart & Co.: We see no sign of your having recovered the difference due us. It makes us think more and more that paying cash is always a bad transaction. You must insist upon getting the difference for us at once.

Consular invoices: You will either have to change your name or get somebody else to sign the invoices. You have undervalued in such a foolish way that the examiner informed us last week that if the invoices were not made more clearly and correctly he would refuse to pass upon the goods, and we would have to wait weeks for the cases. You do not seem to realize that this is a very serious question. You will remember that at one time when the writer left Martin he told you what had to be done, and called your attention to the fact that exaggeration never works here. Please bear this in mind, and also that the percentage which I had given you is quite sufficient.

Furthermore, in the cases received this week you invoice the high-priced scarfs at full price, 25 frs., and others at 18 fr. you invoice at 7 fr. 50, or something like that. Now, in your estimation, is that not the most ridiculous thing that can be done?

23 No matter how little the examiner knows, he would certainly know that if one scarf is worth 25 frs., the other must be worth at least 15, if not 18, frs.

Really, if you do not give these consular invoices some of your personal attention, it is perfectly useless for us to go ahead, as for the sake of a few thousand francs we do not want to spoil our reputation and have a lot of difficulties with our other invoices. If it were not for the fact that the examiner is a friendly one, every yard of your goods would have been seized, we would have had to pay the duty just the same, and we would have had no goods either for the duty or the bills we have to pay in Paris.

Vous ne controllez pas les factures. Martin facture "4256" at 25 f., le prix en est de 12 et les autres livraisons sont bien facturies a' 12 f! ! !

Mous commettous ce soir patron 8170 30 pas noir pour lioraison rapide.

Sincere salutations MILLS & DUFLOT.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 7, 1911. John A. Shields, Clerk.

24 United States Circuit Court, Southern District of New York.

THE UNITED STATES
v.
LAWRENCE H. MILLS AND OTHERS.

This cause comes here upon a petition to instruct the United States marshal and the district attorney to return certain books and papers to the defendants.

LACOMBE, C. J.: The defendants are copartners, who have for some time been carrying on business in this city as importers of silks, veilings, laces, etc. They have been indicted for conspiracy to defraud the United States of money due or to become due upon a case of merchandise imported from a foreign country by means of a false and fraudulent invoice. A bench warrant for their arrest was duly issued, and the marshal, with deputies and others to assist him, went to defendants' place of business, arrested them, and at the same time searched for, found, seized, and removed from the premises a large number of books and papers. These were turned over to the district attorney. He has since returned to defendants all papers relating to their current business and certain books and papers which do not relate to or concern charges of crime now pending in court and before the grand jury.

25 Defendants contend that there is no warrant of law for the seizure of these books and papers, which are concededly their property, and ask for their return.

The numerous authorities which have been cited from the various State reports are interesting, but not controlling, since we are concerned solely with the action of a Federal officer, the power of a Federal court, and the construction of the Federal Constitution.

From time immemorial an officer making a lawful arrest on a criminal charge has taken into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence on the trial. A bloodstained knife or garment, a half-emptied phial of poison, a mask or disguise, counterfeit coins, plates for printing counterfeit notes, gambling devices, stolen property, and many other articles are thus seized every day on the person or the premises of the alleged criminal, and no one disputes the propriety of such seizure.

In the case at bar, there has been a general seizure of all the defendants' business records. These include books and loose sheets of paper on which defendants or their employees, under their instructions, have from time to time made written statements recording the transactions of their business for some time past. The Government officers were in possession of information which in their opinion indicated that defendants had on Dec. 3, 1906, imported by S. S. "Adriatic" a case of veiling marked "P. [diamond] R. P. 173," and defrauded the Government of a portion of the duties thereon by means of a false and fraudulent invoice. This evidence proved sufficient to satisfy the grand jury, and defendants were indicted for so doing. The bench warrant refers to the indict-
26 ment and commands the marshal to arrest the three defendants, describing particularly the persons to be seized, but not "particularly describing the place to be searched and the * * * things to be seized." (Fourth amendment to the Constitution.) When executing the bench warrant the marshal seized not only the documents concerned with the particular importation of Dec. 3, 1906, but also all the books and papers of the firm covering their business above referred to. Having examined these, the district attorney states that they disclose evidence of further offenses, as to which he is about to advise the grand jury that "further indictments charging additional offences than those contained in the indictment already found could be found."

It may be highly desirable, from the point of view of a prosecuting officer, that some such comprehensive seizure of a person's books and papers should be had; the trial of an offence charged may be thus facilitated, and it may be easier to discover that the same person has been guilty of other similar offences. It may promote the ends of justice that the right to search and seize should be strengthened rather than impaired. It may be that there is "much less danger of doing injustice to the individual than there is of overlooking the obligations of those in authority to organized society." Opinions will differ as to which is the wiser public policy. But whatever may be

one's individual opinion, it is difficult to see how a subordinate Federal court can sustain such a wholesale seizure as we have here, so long as the decision of the Supreme Court in Boyd v. U. S. (116 U S., 616) remains unreversed and unqualified. It certainly has never been reversed, and the subsequent decisions of the Supreme Court in
27 which it has been referred to do not indicate that the practice followed in this case should be approved. In Adams v. New York (192 U. S., 585) the court is careful to point out that the only question before it was as to the introduction in testimony of papers found on defendant's premises at the time of his arrest; that the "Supreme Court of New York, before which defendant was tried, was not called upon to issue process or to make any order calling for the production of the private papers of the accused, nor was there any question presented as to the liability of the officer for wrongful seizure, or of the plaintiff in error's right to resist with force the unlawful conduct of the officer." In Brown v. Walker (161 U. S., 591) it was held, with strong dissent, that the provisions of the interstate commerce act requiring a witness to produce books and papers which tend to criminate him were valid because the same section afforded him absolute immunity against prosecution, Federal or State, for the offence to which the papers relate, which was the full equivalent of his constitutional protection. It might be contended that sec. 860, U. S. Revised Statutes, which provides that "no * * * evidence obtained from a party * * * by means of a judicial proceeding * * * shall be given in evidence or in any manner used against him * * * in any court of the United States in any criminal proceeding," would afford sufficient protection to defendants and be an equivalent of the constitutional provisions. (Fourth and fifth amendments.) But that section has recently been repealed, and the argument which prevailed in the interstate commerce case can not be made here.

In Hale v. Henkel (201 U. S., 43) the court holds that a witness who can not avail of the fifth amendment as to oral testimony,
28 because of a statute granting him immunity from prosecution, can not set it up as against the production of books and papers, as the same statute would equally grant him immunity in respect to matters proved thereby. But there is no immunity statute to which these defendants can appeal. It is unnecessary to refer to the many cases which cite Boyd v. U. S. with approval.

The petition to direct the district attorney to return the books is granted. As that officer, however, will probably seek to review this decision, provision will be made on settlement of the order for securing the papers against loss pending appeal.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 7, 1911. John A. Shields, Clerk.

29 *Order.*

At a stated term of the United States Circuit Court for the Southern District of New York, held at the United States court and post-office building, borough of Manhattan, city of New York, in said district, on the 15th day of March, 1911.

Present: Hon. E. Henry Lacombe, circuit judge.

IN THE MATTER OF THE PETITION OF LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, AND EMIL S. DUFLOT FOR AN ORDER TO SHOW CAUSE WHY CERTAIN BOOKS AND PAPERS SEIZED AT THE TIME OF THE PETITIONERS' ARREST SHOULD NOT BE SURRENDERED TO SAID PETITIONERS.

Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, having on the 23rd day of February, 1911, filed a petition in this court praying for an order to show cause why certain books seized at the time of the petitioners' arrest should not be surrendered to said petitioners, and an order directed to the United States district attorney to show cause why the books should not be surrendered having thereupon been made and entered on the 23rd day of February, 1911, and Henry A. Wise, United States attorney for the Southern District of New York, having filed his return to said order to show cause in the nature of an affidavit, verified on the 4th day of March, 1911, and the said motion having come on to be heard by this court,

Now, after reading and filing the said petition and order to
30 show cause dated February 23, 1911, and said affidavit of Henry A. Wise, United States attorney, verified the 3rd day of March, 1911, and after hearing counsel for the respective parties, and, upon all the proceedings had and papers filed herein, and due deliberation having been had, it is, upon motion of Everett, Clarke, Benedict & Ward, Esqrs., attorneys for petitioners,

Ordered and adjudged that the taking of the books and papers at the time of the arrest of petitioners and the detention of the same by the United States attorney are in violation of the provisions of the Constitution of the United States; and it is further

Adjudged that an order be, and the same hereby is, made directing the United States attorney for the Southern District of New York to return forthwith said books and papers taken into possession at the time of the arrest of the petitioners and now in the custody of the said United States attorney.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 15, 1911. John A. Shields, Clerk.

31 *Statement of grounds of United States attorney's refusal to obey order.*

United States Circuit Court, Southern District of New York.

IN THE MATTER OF THE PETITION OF LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, AND EMIL S. DUFLOT FOR AN ORDER TO SHOW CAUSE WHY CERTAIN BOOKS AND PAPERS SEIZED AT THE TIME OF THE PETITIONERS' ARREST SHOULD NOT BE SURRENDERED TO SAID PETITIONERS.

Now comes Henry A. Wise, United States attorney for the Southern District of New York, and respectfully represents to this court: That he has read and considered the opinion filed by this court on March 8, 1911, in the proceeding herein and the order entered thereon on March 15, 1911, directing him to turn over all the books and papers now in his possession taken at the time of the arrest of the petitioners—Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, hereinafter called defendants. Referring to said opinion, in which it is stated by the court that "there has been a general seizure of all the defendants' business records," the said United States attorney begs leave to state that at the time of the arrest of said defendants only such books and papers were seized by the arresting officer as at the time were believed reasonably to relate to the proof of the offence charged against the said defendants, and that subsequently such books and papers as did not relate to the proof of the said charge were voluntarily surrendered by the United
32 States attorney to the said defendants, as hereinafter set forth; that it now appears that two certain volumes containing papers relating to certain business transactions of the said defendants do not bear upon the charge for which said defendants were arrested as aforesaid, and these two volumes the United States attorney has this day returned to said defendants, to wit, "Acc. 200, volume 2," and "Price lists, Paris, Berlin, 7."

As to the direction of this court to turn over the other books and papers now in his possession and taken into custody at the time of the arrest of the defendants, said United States attorney is unwilling and respectfully refuses to comply with said order, and the grounds of his refusal to obey the said order are as follows:

I. On February 20, 1911, complaint was duly made under oath before John A. Shields, one of the United States commissioners for the Southern District of New York, by John M. Williams, inspector of customs of the United States, charging the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot with the crime of conspiracy to defraud the United States of money due and to become due to the United States as a portion of the customs duties upon certain merchandise to be imported into the United States from a for-

eign country; that annexed hereto and made a part hereof, marked "Exhibit A," is a true copy of said complaint; that thereafter the said John A. Shields, as said United States commissioner, duly issued his warrant of arrest, which said warrant was delivered to the United States marshal for the Southern District of New York, who thereupon deputized one Edward J. Brennan to execute said war-
33 rant; that annexed hereto and made a part hereof, marked "Exhibit B," is a true copy of said warrant; that thereafter, on the 20th day of February, 1911, the said Edward J. Brennan proceeded to the premises known as 465 Broome Street, borough of Manhattan, city of New York, and entered, and by virtue of the lawful authority of said warrant of arrest duly and in accordance with law, placed the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot under arrest and duly conveyed them to the United States court and post-office building.

II. At the time of making said arrest the said officer of the United States did duly and in manner and form authorized by law take into his custody and possession certain books and papers which were and are and do contain evidence of a crime committed by said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, to wit, the crime charged in the said complaint, and for the commission of which crime said defendants were lawfully apprehended as aforesaid; and the said books and papers were thereupon taken by the said officer to the United States court and post-office building and were delivered into the lawful custody and possession of the United States attorney, and are now in the official custody and possession of said United States attorney.

III. Thereafter, on the 20th day of February, 1911, a complaint was made before the grand jury for this district, and said defendants were and had been for some time engaged in the persistent practice of defrauding the United States out of a portion of its revenue due as customs duties upon merchandise imported into the United
34 States from a foreign country; that upon evidence adduced before said grand jury an indictment was duly found against said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot; said indictment was handed into this court on said 20th day of February, 1911, and a bench warrant issued thereon; that said defendants were thereupon duly taken into custody by the United States marshal for this district upon said bench warrant, and on the said 20th day of February, 1911, were duly arraigned upon said indictment and held by this court upon bail to answer the same; that the crime charged in said indictment was the same crime as that as to which complaint was made before said United States commissioner and upon which said commissioner issued his warrant of arrest as aforesaid.

IV. The crimes and offences charged against said defendants, which were the basis of the complaint upon which the commissioner's warrant was issued as aforesaid, and upon which said defendants were apprehended as aforesaid, and upon which the indictment as aforesaid was returned by the grand jury, were committed, and the said

defendants did conspire to commit the said crimes and offences by means of consular invoices which fraudulently understated the true purchase price of articles fraudulently imported into the United States, and by means of private invoices which surreptitiously stated the true purchase price of said articles; and these two sets of invoices or copies thereof which are deemed by the United States attorney to constitute instruments of the very crimes and offences charged against said defendants are among the books and papers which were taken at the time of the arrest of the defendants and are now retained,
35 for the necessary purpose of prosecution, in the official custody of said United States attorney.

V. All of the said books and papers now in the custody of the United States attorney are and contain competent and relevant evidence establishing the commission of the very crimes and offences against the laws of the United States by said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, and each of them, for which the said commissioner issued his warrant of arrest, and for which the said grand jury duly returned its indictment as aforesaid, and they reasonably bear upon and relate to the very said charges of crime against said defendants as aforesaid, and are, and in all reasonable probability will be, necessary to the proof of said crimes upon the trial of said defendants therefor, that the books and papers now in the possession of the United States attorney set forth and establish the details of the fraudulent practice adopted by said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot in their scheme and conspiracy to defraud the United States of a portion of its customs duties which was the basis of said complaint upon which said defendants were arrested and for which they were subsequently indicted as aforesaid.

VI. The United States attorney has probable cause to believe, and does in truth and in fact verily believe, that said defendants and each of them are guilty of the crime for which they were apprehended as aforesaid and with which they are charged in said indictment; that the United States attorney is in possession of a certain letter
36 dated February 5, 1909 (made a part hereof, and a copy of which is hereto annexed, marked "Exhibit C"), sent by Mills & Duflot, that being the firm name of said defendants, in which said defendants instruct their agent in Paris as to the manner and form in which said agent should undervalue the merchandise which was then and there being imported into the United States by said defendants; that on said 20th day of February, 1911, upon being apprehended as aforesaid, said Emil S. Duflot, one of the defendants, admitted the authenticity of said letter, and that the same was signed by him; that the books and papers now in the possession of the said United States attorney set forth and establish the details of the practice adopted by said defendants in their scheme to defraud the United States as outlined in said letter of February 5, 1909 (Exhibit C).

VII. The United States attorney on the 23rd day of February, 1911, voluntarily permitted the said Lawrence H. Mills and his coun-

sel to examine said books and papers, and voluntarily surrendered and returned to said Mills such few books and papers as were taken which related to the current business of said defendants, and papers which careful examination disclosed did not actually relate to or concern the crime charged against said defendants.

VIII. All of the said books and papers now in the custody of the United States attorney are at all times accessible to and subject to examination by said defendants or their attorneys for the due preparation of their case.

IX. In no event will any of the books or papers taken into
37 possession at the time of defendants' arrest and now in the custody of the United States attorney be detained longer than the demands of the prosecution now pending against these defendants reasonably require.

X. The number of books and papers taken into possession at the time of the defendants' arrest and now in the custody of the United States attorney did not constitute "a general seizure of all the defendants' business records;" in fact, the books so taken and now detained constitute a very small part of the business records of said defendants, insignificant as compared with all the records at the premises of the defendants at the time of their arrest. Only such of their books and papers were taken at the time of the arrest as were believed reasonably to relate to the crime for which the arrest was made. Annexed hereto and made a part hereof, marked "Exhibit D," is a list and a brief description of the books and papers taken at the time of the arrest of defendants and now detained by the United States attorney.

XI. For the foregoing reasons and in view of the grave importance to the public interest of the question at issue, the United States attorney, with due respect to the court, feels constrained to refuse to comply with said order of this court until a final determination on appeal of the question involved.

Respectfully submitted.

HENRY A. WISE.

38 STATE OF NEW YORK, COUNTY OF NEW YORK,
Southern District of New York, ss:

Henry A. Wise, being duly sworn, deposes and says that he is United States attorney for the Southern District of New York; that the foregoing statement is true to his own knowledge and belief.

The sources of his information and the grounds of his belief are official investigations made by him and official reports made to him in respect to the matters herein above set forth.

HENRY A. WISE.

Sworn to before me this 14th day of March, 1911.

[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co.,
Cert. filed in N. Y. Co.

39

Exhibit A.

Before John A. Shields, U. S. commissioner, Southern District of New York.

United States *vs.* Lawrence H. Mills, Charles G. Mourraille, Emil S. Duflot.	Conspiracy to defraud the United States. Sec. 544, U. S. R. S.; sec. 9, customs administrative act.

Southern District of New York, *ss:*

John M. Williams, being duly sworn, deposes and says: I am an inspector of customs of the United States at the port and collection district of New York.

Upon information and belief, I say that on the first day of October, 1909, at the city and county of New York and within the jurisdiction of this court, Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot did unlawfully, willfully, knowingly, and feloniously conspire with each other and with divers other persons unknown to defraud the United States of lawful money due and thereafter to become due to the United States as a portion of the customs duties upon certain merchandise subject to duty by law, imported into the United States from a foreign country, to wit, France, by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, who were engaged in business in the said city and county of New York under the name and style of "Mills and Duflot;" that the object of said conspiracy was to be effected by presenting to the collector of customs at the port of New York fraudulent and false invoices, affidavits,
40 statements, and declarations in connection with and relating to the said imported merchandise, which was to be thereafter entered into the commerce of the United States at the said port of New York.

That to effect the object of the said conspiracy and pursuant thereto said Lawrence H. Mills on the 3rd day of December, 1909, subscribed and made a declaration of owner forming a part of and contained in a certain written entry of imported merchandise presented to the collector of customs at the port of New York by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, under and by the name and style of "Mills & Duflot," which said written entry referred to and embraced one case of veilings theretofore imported from a foreign country, to wit, France, on the 3rd day of December, 1909, in the steamship "Adriatic," and marked "$^{P}_{R}{}^{R}$ 173," and was given the serial number 304243 by the said collector of customs.

The sources of my information and the ground of my belief as to the facts herein recited are the official records remaining on file in the office of the said collector of customs and documentary evidence in

relation thereto and statements made by witnesses whose names can not now be disclosed without impeding the administration of justice, but who can be produced at the proper times and places.

JOHN M. WILLIAMS.

Subscribed and sworn to before me this 18th day of February, 1911.

[SEAL.] JOHN A. SHIELDS, *U. S. Com.*

41 EXHIBIT B.

To the marshal of the United States for the Southern District of New York, and to his deputies, or any or either of them:

Whereas at a Circuit Court of the United States of America for the Southern District of New York, in the second circuit, begun and held at the borough of Manhattan, in the city of New York, within and for the district and circuit aforesaid, on the 20th of February, in the year of our Lord one thousand nine hundred and eleven, the grand jurors in and for the said district and circuit brought into the said court a true bill of indictment against Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for having, on the 3rd day of December, 1906, at the Southern District of New York, and within the jurisdiction of this court, imported certain merchandise subject to the payment of duty by law, from a foreign country, to wit, France, said merchandise being consigned to the said defendants under the name and style of "Mills & Duflot," and consisting of certain veiling contained in a case marked "P. P. 173," whereby the United States was deprived of a portion of the lawful duties accruing upon the said merchandise, by means of a false and fraudulent invoice; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided, as by said indictment, now remaining on
42 file and of record in the said court, may more fully appear; to which indictment the said Lawrence H. Mills, Charles G. Mourraille & Emil S. Duflot have not yet appeared or pleaded.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Lawrence H. Mills, Charles G. Mourraille & Emil S. Duflot, and then bring before the said court, at the U. S. court and post-office building, in the city of New York, to answer the indictment aforesaid.

Witness, the Honorable Edward D. White, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, the 20th day of Feb'y, in the year of our Lord one thousand nine hundred and eleven.

JOHN A. SHIELDS, *Clerk.*

HENRY A. WISE,
U. S. Attorney.

43

EXHIBIT C.

L. H. MILLS. G. G. MOURRAILLE.

MILLS & DUFLOT,
CHIFFONS, NETTINGS, JAPANESE AND EUROPEAN SILKS,
469–471 Broome Street.

NEW YORK, *February 5, 1909.*

Mr. P. RAVIER,
Paris, France.

DEAR SIR: We confirm exchange of cable.

Regarding your inquiry about Martin, we wired you to ship what you have in stock, and hope they will go forward at once. You might bear in mind that orders placed in October and November and which are not in New York by the first of February are always liable to be cancelled. If our customers have not the goods to show when the trade is in town, they are unable to sell until the following season.

Doning: We confirmed the order at 1 fr. 15, which is more than we wanted to pay. You have the shades, and you may ship them in lots of about 25 pieces as they come off the loom. We enclose herewith confirmation.

Tosca nets: We reordered Qual. 271/1286. We used two words on this quality number instead of one, and this is very apt to cause complication.

We added that you should send us new samples in a small "reseau," and received your answer that you did not understand what it meant. If you had looked at the code, you would have seen that "label" means to "send more samples." You have a code, and we should like to use it as much as possible. As you write in
44 English, we thought you would understand what "smaller" meant. Consequently, we wired you back last night in plain language. We are preparing another code, which is very extensive, but we are so busy taking and filling orders that we have no time to finish it.

Rolandbart & Co.: We see no sign of your having recovered the difference due us. It makes us think more and more that paying cash is always a bad transaction. You must insist upon getting the difference for us at once.

Consular invoices: You will either have to change your name or get somebody else to sign the invoices. You have undervalued in such a foolish way that the examiner informed us last week that if the invoices were not made more clearly and correctly he would refuse to pass upon the goods, and we would have to wait weeks for the cases. You do not seem to realize that this is a very serious question. You will remember that at one time when the writer left Martin he told you what had to be done, and called your attention to the fact that exaggeration never works here. Please bear this in mind, and also that the percentage which I had given you is quite sufficient.

Furthermore, in the cases received this week you invoice the high-priced scarfs at full price, 25 frs., and others at 18 fr. you invoice at 7 fr. 50, or something like that. Now, in your estimation, is that not the most ridiculous thing that can be done?

45 No matter how little the examiner knows, he would certainly know that if one scarf is worth 25 frs., the other must be worth at least 15 if not 18 frs.

Really, if you do not give these consular invoices some of your personal attention, it is perfectly useless for us to go ahead, as for the sake of a few thousand francs we do not want to spoil our reputation and have a lot of difficulties with our other invoices. If it were not for the fact that the examiner is a friendly one, every yard of our goods would have been seized, we would have had to pay the duty just the same, and we would have had no goods either for the duty or the bills we have to pay in Paris.

Vous ne controllez pas les factures. Martin facture "4256" 25 f., le prix en est de 12 et les autres livraisons sont bien facturées à 12 f! ! !

Nous commettons ce soir patron 8170 30 pas noir pour livraison rapide.

Sincere salutations. MILLS & DUFLOT.

46 EXHIBIT D.

1	File. Copies of foreign orders, Feby. 27/09, to Jany. 4, 1910.
3	File. Copies of foreign orders, Oct. 3/08, to Sept. 27, 1910.
4	File. Copies of foreign orders, Oct. 5/1910, to Feby. 7, 1911.
6	File. Paris invoices and duty bills, Aug. 19/08, to Jan. 12/11.
10	File. Lyons invoices, May 19/09, to Nov. 10, 1910.
12	File. Copy of order, Jany. 27/09. Rest of papers torn out.
13	File. Lyons orders, August 6, 1910, to Feby. 4, 1911.
14	File. Lyons invoices, Oct. 19, 1910, to Dec. 6, 1910.
150	Ledger. Personal accounts, Dec./05, to Dec. 8, 1910.
250	Journal. Personal accounts, Dec./05, to Dec. 8, 1910.
300	Ledger.
400	Ledger.
A	File. Foreign receipts, Jany. 1/07, to Jany. 21, 1911.
B	File. Letters and Paris invoices, Oct./08, to Dec. 5, 1910.
C	Ledger sheets, covering various foreign accounts, May/06, to April, 1910.
D	File. Foreign bills & bills of lading, Feby. 10 to Dec. 31/10.
E	Receipts for foreign drafts, Dec. 31/08, to Feby. 10, 1911.
F	File. Zurich letters & invoices, May 30/08, to Jany. 5, 1911.
G	Paris letters, invoices, & ledger sheets, Feby., 1909, to Jan. 23/11.
H	File. Bills to L. H. Mills, Jany. 3/02, to Oct. 25/05.
I	File. Foreign bills & letters, Jany. 12/09, to March 11, 1910.

J File. Bills & letters to L. H. Mills, April 27/03, to Aug. 31/08.
K Cable book, Oct. 28, 1910, to Feby. 16, 1911.
L Press copy letter book, Feby. 27/05, to Nov. 23/10 (foreign prices).
M Press copy letter book, Nov. 18, 1899, to June 21, 1909.
N Press copy letter book, July 26/01, to July 12, 1910.
O Press copy letter book, Oct, 28/09, to Dec. 1/09.
P Box containing letters & statements, July 15/07, to Jan. 17/11.
Q Check book, May 21/09, to Feby. 28, 1911.

47 (Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 15, 1911. John A. Shields, Clerk.

48 *Affidavit of Lawrence H. Mills.*

United States Circuit Court, Southern District of New York.

In the Matter of the Petition of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for an Order to Show Cause Why Certain Books and Papers Seized at the Time of the Petitioners' Arrest Should not be Surrendered to said Petitioners.

Southern District of New York, *ss:*

Lawrence Heyworth Mills, being duly sworn, deposes and says:

That he is one of the defendants herein, and has read the answer of Henry A. Wise, verified March 14, 1911, being the answer to an order entered herein March 14th, 1911, directing him to turn over certain books and papers to deponent and the other defendants herein; that inasmuch as there appears some contradiction between the original petition of deponent and said answer of Henry A. Wise as to the nature and number of the books used by defendants in their business, deponent states: That the business of defendants consists of importing merchandise in large quantities and from a few manufacturers and selling them in the United States to a very large number of jobbers and drygoods merchants; that the United States marshal, upon February 20th, 1911, in making the seizure referred to, did not seize the books and papers relating to the selling
49 department of defendants' business, which constitutes in bulk the larger part of the books and records of the firm.

It is still true, however, as stated in the original petition herein, that the marshal seized substantially all of the books and papers used in the business of importing silks and other drygoods.

The business is conducted with Zurich, Switzerland; Lyons, and Paris, and Japan.

The books and papers relating to the European importations were substantially all taken.

The indictment herein has to do exclusively with shipments from Paris, which constitute in value less than 10% of the total importations made by the defendants.

LAWRENCE HEYWORTH MILLS.

Sworn to before me this 14th day of March, 1911.

[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co., Cert. filed in N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., filed Mar. 15, 1911, John A. Shields, clerk.

50 *Order of commitment.*

At a stated term of the United States Circuit Court for the Southern District of New York, held at the United States court and post-office building, borough of Manhattan, city of New York, in said district, on the 15th day of March, 1911.

Present: Hon. E. Henry Lacombe, circuit judge.

IN THE MATTER OF THE PETITION OF LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, AND EMIL S. DUFLOT FOR AN ORDER TO SHOW CAUSE WHY CERTAIN BOOKS AND PAPERS SEIZED AT THE TIME OF PETITIONERS' ARREST SHOULD NOT BE SURRENDERED TO SAID PETITIONERS.

Upon the order made and entered the 15th day of March, 1911, directing the United States attorney for this district to turn over certain books and papers taken at the time of the arrest of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot and now detained by said United States attorney, and after reading the statement of Henry A. Wise, Esq., United States attorney for the said Southern District of New York, verified the 14th day of March, 1911, setting forth his reasons for refusing to obey said order, and the affidavit of Lawrence H. Mills, verified the 14th day of March, 1911, it is, upon motion of Everett, Clarke, Benedict & Ward, Esqrs., attorneys for petitioners,

Ordered and adjudged that the said Henry A. Wise is guilty of contempt of this court; and it is further

51 Ordered and adjudged that said Henry A. Wise be, and he hereby is, committed to the custody of the United States marshal for the Southern District of New York, and that he stand committed to such custody until he shall comply with the order herein heretofore made or otherwise purge himself from this contempt.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 15, 1911. John A. Shields, Clerk.

52 *Assignments of error.*

United States Circuit Court, Southern District of New York.

IN THE MATTER OF AN ALLEGED CONTEMPT OF HENRY A. WISE, UNITED STATES ATTORNEY.

Now comes Henry A. Wise, United States attorney for the Southern District of New York, and for his assignment of errors in the above entitled matter says that in the final order and judgment heretofore made and entered in this court on the 15th day of March, 1911, wherein he is adjudged to be guilty of contempt of court for not surrendering certain books and papers to Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, there is error in the respects hereinafter set forth, as follows:

I. The court erred in adjudging said Henry A. Wise to be guilty of contempt of court in not surrendering the said books and papers.

II. The court erred in refusing to grant an order ordering and adjudging that said Henry A. Wise was not in contempt of court in refusing to surrender the books and papers which came into his official custody as United States attorney.

III. The court erred in adjudging that the taking into custody of said books and papers at the time of the lawful arrest of said
53 Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot was in violation of the provisions of the Constitution of the United States.

IV. That the court erred in making the order of March 15th, 1911, directing the said Henry A. Wise to surrender books and papers which came into his official custody as United States attorney and which were taken in possession at the time of the arrest of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot as material evidence relating to the criminal charge for which they were arrested.

Wherefore the said Henry A. Wise prays that the order and judgment of said Circuit Court of the United States for the Southern District of New York, adjudging him to be in contempt, may be reversed and that the said court may be directed to enter an order and judgment vacating and setting at naught the said order upon which the commitment and complaint was granted.

HENRY A. WISE,
United States Attorney.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 15, 1911. John A. Shields, Clerk.

54 *Supersedeas.*

United States Circuit Court, Southern District of New York.

IN THE MATTER OF AN ALLEGED CONTEMPT OF COURT OF HENRY A. WISE, UNITED STATES ATTORNEY.

Whereas an order was made on the 15th day of March, 1911, ordering and adjudging Henry A. Wise, United States attorney, guilty of

contempt of court, and a writ of error has been granted to the said Henry A. Wise; and

Whereas a citation pursuant to said writ of error has been issued,

Now therefore it is ordered that the said writ of error operate as a stay of proceedings under said order, and that the execution thereof be suspended and stayed pending said writ of error, and that the said Henry A. Wise be enlarged upon his own recognizance for his appearance to answer the judgment of the Supreme Court.

Dated New York, March 15th, 1911.

E. HENRY LACOMBE,
U. S. C. J.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, March 15th, 1911. Everett, Clarke, Benedict & Ward, attorneys for petitioners. U. S. Circuit Court, Southern District of N. Y. Filed Mar. 15, 1911. John A. Shields, Clerk.

55 United States Circuit Court, Southern District of New York.

By the Hon. E. Henry Lacombe, one of the judges of the Circuit Court of the United States for the Southern District of New York.

To Lawrence H. Mills, Charles G. Mourraille, Emil S. Duflot:

You are hereby cited and admonished to be before the Supreme Court of the United States of America to be holden in the city of Washington, District of Columbia, within thirty days from date hereof, pursuant to writ of error filed in the clerk's office of the United States for the Southern District of New York, and you are to show cause, if any there be, why the judgment in said writ of error mentioned should not be correct and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, city of New York, in the district and circuit above mentioned, the 15th day of March, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty fifth.

E. HENRY LACOMBE,
United States Circuit Judge
For the Southern District of New York.

(Indorsement on cover: File No. 22,584. S. New York, C. C. U. S. Term No. 963. Henry A. Wise, plaintiff in error, *vs.* Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot. Filed March 22d, 1911. File No. 22,584.)

○

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 963.

HENRY A. WISE, PLAINTIFF IN ERROR,

vs.

LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, AND EMIL S. DUFLOT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Stipulation to add to record	a	1
Stipulation as to record	1	1
Warrant and return	4	2
Indictment	7	3
Clerk's certificate	16	8

a In the Supreme Court of the United States, October Term, 1910.

HENRY A. WISE, PLAINTIFF IN ERROR,
v.
LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, and Emil S. Duflot. } No. 963.

Stipulation to add to record on file.

It is hereby stipulated by and between the respective parties in the above-entitled case that the matter attached to this stipulation may be added to the transcript of the record heretofore filed, and printed as a part thereof.

F. W. LEHMANN,
Solicitor General.
A. LEO EVERETT,
Counsel for Defendants in Error.

1 United States Circuit Court, Southern District of New York.

In the matter of the petition of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for an order to show cause why certain books and papers seized at the time of the petitioners' arrest should not be surrendered to said petitioners.

The following is hereby stipulated and agreed by and between the counsel for the respective parties with reference to the transcript of record herein certified to the Supreme Court of the United States:

I. That the arrest of the defendants herein was made by virtue and under the authority of a warrant of arrest duly issued by John A. Shields, United States commissioner for the Southern District of New York, on the 20th day of February, 1911, and that the books and papers herein were taken in custody by a duly deputized United States marshal at the time of lawfully executing said warrant of the United States commissioner.

II. That the warrant of arrest under which the taking into custody of the books and papers herein issued is sought to be justified in the statement and affidavit of United States Attorney Wise, dated, respectively, the 4th day of March, 1911, and the 14th day of
2 March, 1911, is the warrant of arrest of Commissioner Shields hereinabove referred to and not the warrant referred to as Exhibit B in said affidavit and statement.

III. That after the making of the complaint before the United States commissioner against said defendants and the execution of the warrant of arrest issued by said commissioner herein referred to, the defendants were, on February 20, 1911, indicted by the grand jury for the Southern District of New York.

IV. That a bench warrant was issued upon such indictments, and it is this warrant which is referred to in the affidavit and statement

of United States Attorney Wise and annexed thereto as Exhibit B. At the time this bench warrant was issued the defendants had already been taken into lawful custody under the aforesaid commissioner's warrant dated February 20, 1911, issued upon a complaint made to him, and the books and papers referred to had already been taken into possession by the marshal in the execution of said commissioner's warrant.

V. That the commissioner's warrant and the indictment above referred to have been omitted from the record heretofore certified to the Supreme Court.

VI. That the commissioner's warrant dated February 20,
3 1911, and the indictment found February 20, 1911, be certified and forwarded to form part of the transcript of record upon the writ of error herein.

Dated New York, April 4, 1911.

HENRY A. WISE, *United States Attorney.*
EVERETT, CLARKE, BENEDICT & WARD,
Attorneys for Mills, Mourraille, and Duflot.

So ordered.

LEARNED HAND,
U. S. Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Apr. 4, 1911. John A. Shields, clerk.

4 *The President of the United States of America to the marshal of the United States for the Southern District of New York, and to his deputies, or any or either of them:*

Whereas complaint on oath hath been made to me, charging that Lawrence H. Mills, Charles G. Mouraille, Emil S. Duflot, did on or about the first day of October, in the year one thousand nine hundred and nine, at the Southern District of New York and within the jurisdiction of this court, Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, unlawfully, willfully, knowingly, and feloniously, conspire with each other and with divers other persons unknown, to defraud the United States of lawful money due, and thereafter to become due, to the United States as a portion of the customs duties upon certain merchandise subject to duty by law, imported and thereafter to be imported into the United States from a foreign country, to wit, France, by the said Lawrence H. Mills, Charles G. Mouraille, and Emil S. Duflot, who were engaged in business in the city and county of New York under the name and style of "Mills & Duflot;" that the object of said conspiracy was to be effected by presenting to the collector of customs at the port of New York fraudulent and false invoices, affidavits, statements, and declarations in connection with and relating to the said imported merchandise which was to be thereafter entered into the com-
5 merce of the United States at the said port of New York—as by reference to a certified copy of the complaint hereto annexed will more fully and at large appear—against the peace of the United

States and their dignity and against the form of the statute of the United States in such case made and provided.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Lawrence H. Mills, Charles G. Mouraille, and Emil S. Duflot and bring their bodies forthwith before me, or some judge or justice of the United States, wherever in the State of New York they may be found, that they may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 20th day of February, in the year of our Lord one thousand nine hundred and eleven.

JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

HENRY A. WISE,
United States Attorney.

[SEAL.]

6 (Endorsements.)

Conspiracy to defraud the United States. Sec. 5440, U. S. R. S., sec. 9, customs administrative act.

U. S. Circuit Court. The United States of America *vs.* Lawrence H. Mills, Charles G. Mouraille, & Emil S. Duflot. Warrant to apprehend. Henry A. Wise, United States attorney. I hereby depute McEnany Kopp Hecht to execute the within process. Dated New York, Feby. 20th, 1911. Wm. Henkel, U. S. marshal. 16244—16245—16246.

Received this warrant on the 20th day of Feby., 1911, at New York City and executed the same by arresting the within-named Lawrence H. Mills, Charles G. Mourallie, Emil S. Duflot at New York City on the 20th day of Feb., 1911, and have their bodies now in court as within I am commanded.

Feb. 20/11.

WM. HENKEL,
U. S. Marshal.

Three defendants brt. before me. Complaint superseded by indictment & defts. discharged on within warrant.

JOHN A. SHIELDS,
U. S. Commr.

7 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the second day of January, in the year of our Lord one thousand nine hundred and eleven, and continued by adjournment to and including the twentieth day of February, in the year of our Lord one thousand nine hundred and eleven.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath, present that at all the times hereinafter mentioned Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot (hereinafter called and referred to as the defendants) were doing business in the city of New York, in the county and Southern District of New York, as a firm and copartnership under and by the firm name and style of "Mills and Duflot," and were engaged, among other things, in importing into the commerce of the United States at the port of New York from a foreign country divers goods, wares, and merchandise; that on the third day of December, in the year nineteen hundred and nine, certain imported merchandise subject to the payment of duty by law arrived at the port of New York from a foreign country, to wit, from France, on the steamship "Adriatic," said merchandise being consigned to the said defendants under the name and style of "Mills and Duflot," and consisting of certain veiling contained in a case marked

8 "P⟨R⟩P 173;" that thereafter, on the third day of December, in the year nineteen hundred and nine, the said defendants, under and by the name and style of "Mills and Duflot," did unlawfully, knowingly, wilfully, and feloniously make and attempt to make an entry of the said imported merchandise into the commerce of the United States at the said port and Southern District of New York and within the jurisdiction of this court, by means of a certain fraudulent and false invoice thereof and a fraudulent and false written statement, hereinafter more particularly referred to and described; that on the said third day of December, in the year nineteen hundred and nine, the said defendants, under the name and style of "Mills and Duflot," did present to the collector of customs at and for the port and collection district of New York, a certain fraudulent and false written entry of the said imported merchandise, to wit, of the said veiling, which said written entry the said collector did thereupon designate with and by the serial number 304243; that on the said third day of December, in the year nineteen hundred and nine, the said defendants, under and by the name and style of "Mills and Duflot," did present the said certain fraudulent and false invoice of the said merchandise to the said collector of customs, and the said collector did thereupon designate said fraudulent and false invoice by the serial number 2885.

And the jurors aforesaid do further say that the said invoice, designated number 2885 as aforesaid, was fraudulent and false in the following particulars; that is to say, that the same stated the actual cost of the said imported merchandise contained in the said case marked as aforesaid to be francs 548.20, whereas in truth and in fact the actual cost of the said merchandise was francs 636.95, as the said defendants then and there well and truly knew; and the said

9 invoice was fraudulent and false in the further particular that it contained a statement and declaration by one A. Roux, who was acting in that behalf as the agent of the said firm of Mills and

Duflot, that no different invoice of the merchandise mentioned in said invoice had been or would be furnished to anyone, whereas in truth and in fact another and different invoice of the said merchandise had been and would be furnished to the said defendants, as the said defendants then and there well and truly knew.

And the jurors do further say that the said written entry, designated number 304243 as aforesaid, was fraudulent and false in that it contained a statement and declaration by the said Lawrence H. Mills, one of the said defendants, as the owner by purchase of the imported merchandise described in the said written entry and invoice, to the effect that the said invoice and entry contained a just and faithful account of the actual cost of the said merchandise, whereas in truth and in fact the actual cost of the said merchandise was more than the amount stated by the said invoice as hereinbefore set forth and stated, all as the said defendants then and there well and truly knew.

And the jurors do further say that by means of the said fraudulent and false written entry and the said fraudulent and false invoice said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot made and effected the entry into the United States and entered and introduced into the commerce of the United States at the port of New York, and in the Southern District of New York and within the jurisdiction of this court, on the said third day of December, in the year of our Lord nineteen hundred and nine, the said imported merchandise at the cost and value stated in the said false and fraudulent invoice, and not at the actual cost and value of said merchandise as hereinabove stated, whereby the United States was deprived of a portion of the lawful duties accruing upon the said merchandise, to wit, at least the sum of ten dollars and twenty cents; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 9, customs administrative act.)

SECOND CIRCUIT.

And the jurors aforesaid, on their oath aforesaid, do further present that at all the times hereinafter mentioned Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot (hereinafter called and referred to as the defendants) were doing business in the city of New York, in the county and Southern District of New York, as a firm and copartnership under and by the firm name and style of "Mills and Duflot," and were engaged, among other things, in importing into the commerce of the United States at the port of New York from a foreign country divers goods, wares, and merchandise; that on the tenth day of December, in the year nineteen hundred and nine, certain imported merchandise subject to the payment of duty by law arrived at the port of New York from a foreign country, to wit, from France, on the steamship "Majestic," said merchandise being consigned to the said defendants under the name and style of "Mills and Duflot," and consisting of certain veiling contained in a

case marked "P ◇R◇ P 175;" that thereafter, on the eleventh day of December, in the year nineteen hundred and nine, the said defendants, under and by the name and style of "Mills and Duflot," did unlawfully, knowingly, wilfully and feloniously make and attempt
11 to make an entry of the said imported merchandise into the commerce of the United States at the said port and Southern District of New York and within the jurisdiction of this court by means of a certain fraudulent and false invoice thereof and a fraudulent and false written statement hereinafter more particularly referred to and described; that on the said eleventh day of December, in the year nineteen hundred and nine, the said defendants, under the name and style of "Mills and Duflot," did present to the collector of customs at and for the port and collection district of New York a certain fraudulent and false written entry of the said imported merchandise, to wit, of the said veiling, which said written entry the said collector did thereupon designate with and by the serial number 311680; that on the said eleventh day of December, in the year nineteen hundred and nine, the said defendants, under and by the name and style of "Mills and Duflot," did present the said certain fraudulent and false invoice of the said merchandise to the said collector of customs, and the said collector did thereupon designate said fraudulent and false invoice by the serial number 12254.

And the jurors aforesaid do further say that the said invoice, designated number 12254 as aforesaid, was fraudulent and false in the following particulars, that is to say, that the same stated the actual cost of the said imported merchandise contained in the said case marked as aforesaid to be francs 1,632.21, whereas in truth and in fact the actual cost of the said merchandise was francs 1,855.75, as the said defendants then and there well and truly knew; and the said invoice was fraudulent and false in the further particular that it contained a statement and declaration by one A. Roux, who was acting in that behalf as the agent of the said firm of Mills and Duflot, that no different invoice of the merchandise mentioned in said
12 invoice had been or would be furnished to anyone, whereas in truth and in fact another and different invoice of the said merchandise had been and would be furnished to the said defendants, as the said defendants then and there well and truly knew.

And the jurors do further say that the said written entry designated number 311680 as aforesaid, was fradulent and false in that it contained a statement and declaration by the said Charles G. Mourraille, one of the said defendants, as the owner by purchase of the imported merchandise described in the said written entry and invoice, to the effect that the said invoice and entry contained a just and faithful account of the actual cost of the said merchandise, whereas in truth and in fact the actual cost of the said merchandise was more than the amount stated by the said invoice as hereinbefore set forth and stated, all as the said defendants then and there well and truly knew.

And the jurors do further say that by means of the said fraudulent and false written entry and the said fraudulent and false invoice said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot made and effected the entry into the United States and entered and introduced into the commerce of the United States at the port of New York, and in the Southern District of New York, and within the jurisdiction of this court, on the said eleventh day of December, in the year nineteen hundred and nine, the said imported merchandise at the cost and value stated in the said false and fraudulent invoice, and not at the actual cost and value of said merchandise as hereinabove stated, whereby the United States was deprived of a portion of the lawful duties accruing upon the said merchandise, to wit, at least the sum of twenty-five dollars and eighty cents; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 9, customs administrative act.)

13 THIRD COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, late of the city and county of New York, in the district and circuit aforesaid, and divers other persons to the grand jurors unknown, heretofore, to wit, on the first day of October, in the year nineteen hundred and nine, at and within the Southern District of New York and within the jurisdiction of this court, did unlawfully, knowingly, wilfully, and feloniously conspire to defraud the United States of lawful money then and there due and to become due to the United States as a portion of the lawful duty upon imported merchandise, then and there imported and to be imported into the United States by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot from a foreign country, to wit, from France; and that the object of the said conspiracy was to be effected by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot by entering and introducing and attempting to enter and introduce into the commerce of the United States at less than its true cost and actual value the said imported merchandise, and that the entry of said merchandise was to be made at the port and collection district of New York, and was to be effected by means of fraudulent and false invoices, affidavits, and written statements and declarations to be presented by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot to the collector of customs at the said port of New York.

And to effect the object of the said conspiracy and pursuant thereto, said Lawrence H. Mills, on the third day of December, in the year nineteen hundred and nine, subscribed and made a declaration of owner forming a part of and contained in a certain written entry of imported merchandise presented to the collector of customs at
14 the port of New York by the said Lawrence H. Mills, Charles

G. Mourraille, and Emil S. Duflot under and by the name and style of Mills and Duflot, which said written entry referred to and embraced one case of veilings theretofore imported from a foreign country, to wit, France, on the third day of December, in the year nineteen hundred and nine, in the steamship "Adriatic," and marked P R P 173, and was given the serial number 304243 by the said collector of customs.

And further to effect the object of the said conspiracy and pursuant thereto the said Charles G. Mourraille, on the eleventh day of December, in the year nineteen hundred and nine, subscribed and made a declaration of owner forming a part of and contained in a certain written entry of imported merchandise, presented to the collector of customs at the port of New York, by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot under and by the name and style of Mills and Duflot, which said written entry referred to and embraced among other things one case of silk veilings theretofore imported from a foreign country, to wit, France, on the tenth day of December, in the year nineteen hundred and nine, in the steamship "Majestic" and marked P R P 175, and which said written entry was given the serial number 311680 by the said collector of customs; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5440, U. S. R. S., and sec. 9, customs administrative act.)

HENRY A. WISE,
U. S. Attorney.

15 (Endorsed:) U. S. Circuit Court. The United States of America vs. Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, doing business as "Mills and Duflot." Indictment. Undervaluation of imported merchandise and conspiracy to defraud the United States. U. S. Rev. St., sec. 5440, and sec. 9, Customs Administrative Act as amended. Henry A. Wise, U. S. attorney. A true bill, John E. Fairchild, foreman. U. S. Circuit Court, Southern District N. Y. Filed Feb. 20, 1911. John A. Shields, clerk.

1911, Feb. 20, B. W. issued.

Feb. 20. Defts. plead not guilty. Bail fixed in sum of $7,500 as to Mills, $7,500 as to Mourraille, and $12,000 as to Duflot.

16 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to fifteen, inclusive, contain a true and complete transcript of the warrant of arrest and indictment filed in said court in the cause entitled In the matter of the petition of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for an order to show cause why cer-

tain books and papers seized at the time of the petitioners' arrest should not be surrendered to the petitioners, as the same remain of record and on file in my office, same having been omitted from the transcript of record filed on or about the 21st day of March, 1911.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 7th day of April, in the year of our Lord one thousand nine hundred and eleven, and of the independence of the said United States the one hundred and thirty-fifth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsed:) United States Supreme Court. In the matter of an alleged contempt vs. Henry A. Wise, U. S. Atty. Transcript of record from the Circuit Court of the United States for the Southern District of New York. Office of the clerk, Supreme Court U. S. Received Apr. 8, 1911.

(Indorsement on cover:) File No. 22584. Supreme Court U. S. October term, 1910. Term No. 963. Henry A. Wise, pl'ff in error, vs. Lawrence H. Mills et al. Stipulation of counsel and addition to record. Filed April 12, 1911.

○

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 964.

HENRY A. WISE, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of habeas corpus	1	1
Petition for writ of habeas corpus	2	1
Exhibit A. Order committing United States attorney for contempt	6	3
B. Order directing return of books	8	4
C. Petition of Mills, Mourraille, and Duflot	10	5
D. Order to show cause	13	6
E. Affidavit of Henry A. Wise	14	7
Exhibit A. Affidavit of John M. Williams	21	10
B. Bench warrant	23	11
C. Letter of Feb. 5, 1909	25	12
F. Statement of Henry A. Wise	28	14
Exhibit A. Affidavit of John M. Williams	36	18
B. Bench warrant	38	19
D. List of books and papers	40	20
G. Affidavit of Lawrence H. Mills	41	20
Return of marshal to writ of habeas corpus	43	21
Order discharging writ	45	22
Notice of appeal	46	23
Petition for appeal and allowance	47	23
Assignments of error	49	24
Citation and service	51	25
Clerk's certificate	53	25

1 *Writ of habeas corpus.*

The President of the United States to William Henkel, Esq., United States marshal for the Southern District of New York:

We command you that you have the body of Henry A. Wise, United States attorney for the Southern District of New York, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the Circuit Court of the United States in and for the Southern District of New York, on the day of March, 1911, at 10.30 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the said Henry A. Wise, and have you then and there this writ.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 15th day of March, 1911.

JOHN A. SHIELDS, *Clerk.*

Circuit Court of the United States for the Southern District of New York.

The foregoing writ is hereby allowed.

The petitioner may be discharged on his own recognizance pending the proceedings thereon.

H. G. WARD, *U. S. Circuit Judge.*

2 *Petition.*

UNITED STATES CIRCUIT COURT,
Southern District of New York:

In the matter of the application of Henry A. Wise, United States attorney, for a writ of habeas corpus.

To the honorable judges of the Circuit Court for the Southern District of New York:

The petition of Henry A. Wise for a writ of habeas corpus respectfully shows:

1. Your petitioner is a citizen of the United States and an inhabitant of the State and city of New York, in this circuit and district.

2. Your petitioner is now, and since April 8, 1909, has continuously been, United States attorney for the Southern District of New York.

3. Your petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of William Henkel, Esq., United States marshal for the Southern District of New York, to wit, at the borough of Manhattan, in the said city of New York.

4. The sole claim or authority by virtue of which the said William Henkel, marshal as aforesaid, so restrains and detains your peti-

tioner is a certain commitment in writing, a copy of which is hereto annexed and marked "Exhibit A," which commitment is an order of this court, made at a stated term thereof held at the
3 United States courthouse and post office building in the city of New York on the 15th day of March, 1911.

5. The said commitment was made and based solely and exclusively upon an order of this court made and filed the 15th day of March 1911, and upon a verified statement of your petitioner in relation to the last said order, wherein your petitioner stated to this court that he was unwilling to comply with said order and wherein your petitioner further set forth the ground and reasons upon and for which your petitioner felt compelled to disobey said order, which said order and statement are now on file in this court, and your petitioner respectfully refers to the same and begs to make the same a part hereof; that annexed hereto and made a part hereof are true copies of the last-mentioned order (marked "Exhibit B"), the petition to show cause (marked "Exhibit C"), the order to show cause issued thereon (marked "Exhibit D"), the return thereto (marked "Exhibit E"), and the statement of your petitioner setting forth, as aforesaid, the ground of his refusal to obey said order (marked "Exhibit F"), and of the affidavit of Lawrence H. Mills (marked "Exhibit G").

6. The books and papers referred to in said order (Exhibit B) came lawfully into the custody and possession of your petitioner as said United States attorney, as aforesaid, and the said court had no authority or jurisdiction to order your petitioner to surrender the same to the said Lawrence H. Mills, Charles E. Morraille, and Emil S. Duflot, for the reasons more particularly set forth in Exhibit F hereto annexed and made a part hereof, to which reference is respectfully made.

7. The court was without jurisdiction to compel your petitioner, as United States attorney for this district or in any other capacity,
4 to surrender to the persons now under indictment and awaiting trial, to wit, Lawrence H. Mills, Charles E. Morraille, and Emil S. Duflot, books and papers which came into his lawful and official custody, as aforesaid, and are necessary to a prosecution still pending against said defendants.

8. Your petitioner verily believes that for the reasons above stated the order adjudging him guilty of contempt and his commitment pursuant to said order in the custody of the marshal were without legal right, authority, or jurisdiction of any kind, and are utterly void and ineffective, and that his detention and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges, and immunities thereunder.

Wherefore your petitioner prays that a writ of habeas corpus may issue, directed to the said William Henkel, Esq., marshall as aforesaid, or to any of his deputies, requiring him or them to bring and have your petitioner before this court at a time to be by it determined, to the end that due inquiry may be had in the premises and that this

CUT OFF

court may proceed in a summary way to determine the facts of the case in that regard and the legality of your petitioner's imprisonment, restraint, and detention, and thereupon to dispose of your petitioner as law and justice require.

And your petitioner will ever pray.

HENRY A. WISE,
United States Attorney for the Southern District of New York.

Dated New York, March 15th, 1911.

5 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Henry A. Wise being duly sworn, deposes and says:

That he is the petitioner above named, United States attorney for the Southern District of New York;

That he has read the foregoing petition and knows the contents thereof;

That the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

(Sgd.) HENRY A. WISE.

Sworn to before me this 15th day of March, 1911.

[SEAL.] (Sgd.) FREDERICK L. CAMPBELL,
Notary Public.

(Cert. Filed in N. Y. Co.)

6 EXHIBIT A.

At a stated term of the United States Circuit Court for the Southern District of New York, held at the United States court and post-office building, Borough of Manhattan, city of New York, in said district, on the 15th day of March, 1911.

Present: Hon. E. Henry Lacombe, circuit judge.

In the matter of the petition of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for an order to show cause why certain books and papers seized at the time of the petitioners' arrest should not be surrendered to said petitioners.

Upon the order made and entered the 15th day of March, 1911, directing the United States attorney for this district to turn over certain books and papers taken at the time of the arrest of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot and now detained by said United States attorney, and after reading the statement of Henry A. Wise, Esq., United States attorney for the said Southern District of New York, verified the 14th day of March, 1911, setting forth his reasons for refusing to obey said order, and the affidavit of Lawrence H. Mills verified March 14, 1911, it is, upon

motion of Everett, Clarke, Benedict & Ward, Esqrs., attorneys for petitioners,

Ordered and adjudged, that the said Henry A. Wise is guilty of contempt of this court; and it is further

Ordered and adjudged, that said Henry A. Wise be, and he
7 hereby is, committed to the custody of the United States marshal for the Southern District of New York, and that he stand committed to such custody until he shall comply with the order herein heretofore made or otherwise purge himself from this contempt.

(Sgd.) E. HENRY LACOMBE,
U. S. C. J.

8 EXHIBIT B.

At a stated term of the United States Circuit Court for the Southern District of New York, held at the United States court and post-office building, borough of Manhattan, city of New York, in said district, on the 15th day of March, 1911.

Present: Hon. E. Henry Lacombe, circuit judge.

In the matter of the petition of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for an order to show cause why certain books and papers seized at the time of the petitioners' arrest should not be surrendered to said petitioners.

Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, having on the 23rd day of February, 1911, filed a petition in this court praying for an order to show cause why certain books seized at the time of the petitioners' arrest should not be surrendered to said petitioners, and an order directed to the United States district attorney to show cause why the books should not be surrendered having thereupon been made and entered on the 23rd day of February, 1911, and Henry A. Wise, United States attorney for the Southern District of New York, having filed his return to said order to show cause in the nature of an affidavit, verified on the 4th day of March, 1911, and the said motion having come on to be heard by this court,

Now, after reading and filing the said petition and order to
9 show cause dated February 23, 1911, and said affidavit of Henry A. Wise, United States attorney, verified the 3rd day of March, 1911, and after hearing counsel for the respective parties, and, upon all the proceedings had and papers filed herein, and due deliberation having been had, it is, upon motion of Everett, Clarke, Benedict & Ward, Esqrs., attorneys for petitioners,

Ordered and adjudged, that the taking of the books and papers at the time of the arrest of petitioners and the detention of the same by the United States attorney are in violation of the provisions of the Constitution of the United States; and it is further

Adjudged, that an order be, and the same hereby is, made directing the United States attorney for the Southern District of New York to return forthwith said books and papers taken into possession at the time of the arrest of the petitioners and now in the custody of the said United States attorney.

(Sgd.) E. HENRY LACOMBE,

U. S. C. J.

10 EXHIBIT C.

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
against
LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, and EMIL S. DUFLOT, defendants.

To the honorable the judges of the United States Circuit Court for the Southern District of New York:

The petition of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot respectfully shows:

First. That they are copartners, trading at No. 465 Broome Street, in the borough of Manhattan, the city of New York, as importers of laces, silks, and veilings, and other dry goods, and have been so employed for the four years last past.

Second. That on the 20th day of February, 1911, certain servants and agents of the Department of Justice, accompanied by one William Henkel, United States marshal for the Southern District of New York, with his servants and deputies, unlawfully and without warrant or authority seized and carried away, against the will of the
11 petitioners above named, a large quantity of books and papers, the exact number and description of which petitioners are unable to specify, at petitioners' said premises, No. 465 Broome Street, which books and papers are the property of the petitioners, as copartners as aforesaid, and constitute substantially all the books and papers with which they are and have been for several years doing business.

Third. Upon information and belief that said books and papers were taken by said agents and servants of the Department of Justice and said Henkel to the United States court-house and post-office building, in the Southern District of New York, and there given to or placed at the disposal of the Federal grand jury and of the United States district attorney for the Southern District of New York for examination by them.

Wherefore petitioners pray that an order be issued directed to said marshal and to the district attorney to show cause why said books should not be immediately surrendered to petitioners and why said marshal and his deputies and the district attorney should not in

the meantime be restrained from permitting their inspection by any person except the petitioners.

And your petitioners will ever pray.

LAWRENCE H. MILLS,
CHARLES G. MOURRAILLE,
and EMIL S. DUFLOT,
Petitioners.

By LAWRENCE H. MILLS.

EVERETT, CLARKE, BENEDICT & WARD,
Attys. for Defendants.

12 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Lawrence H. Mills, being duly sworn, deposes and says: That he is one of the petitioners above named; that he has read the foregoing petition, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

LAWRENCE H. MILLS.

Sworn to before me this twenty-third day of February, 1911.

[SEAL.] W. E. HANNA,
Notary Public, Kings Co.

(Cert. filed in New York County.)

13 EXHIBIT D.

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
against
LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, and Emil S. Duflot, defendants.

Upon reading the annexed petition of the defendants, verified February 23rd, 1911, and upon motion of Everett, Clarke, Benedict & Ward, attorneys for the defendants, let the United States marshal and the district attorney show cause before this court at the call of the motion calendar on the 24th day of February next, at 10½ o'clock a. m., or as soon thereafter as counsel can be heard, why the books and papers mentioned in the annexed petition should not be immediately surrendered to said defendants; and it is

Service of this order on the United States marshal and the district attorney on or before February 23, 1911, at 1 o'clock p. m., shall be sufficient.

Dated February 23, 1911.

GEO. C. HOLT, *J.*

14

Exhibit E.

United States Circuit Court, Southern District of New York.

United States of America
versus
Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot.

Southern District of New York, *ss:*

Henry A. Wise, being duly sworn, deposes and says: I am the United States attorney for the Southern District of New York, and have read the petition of the above named defendants, verified on the 23rd day of February, 1911, by Lawrence H. Mills, wherein it is stated and alleged that on the 20th day of February, 1911, certain special agents of the Department of Justice, accompanied by the United States marshal for the Southern District of New York, unlawfully and without warrant or authority seized and carried away a large quantity of books and papers, property of the said defendants, from the premises No. 465 Broome Street, in the city of New York. For the information of this court deponent further says on information and belief as follows:

That on the 20th day of February, 1911, complaint was duly made under oath before John A. Shields, one of the United States commissioners for the Southern District of New York, by John M. Williams, inspector of customs of the United States, charging the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot
15 with the crime of conspiracy to defraud the United States of lawful money due and to become due to the United States as a portion of the customs duties upon certain merchandise imported into the United States from a foreign country; that annexed hereto and made a part hereof and marked "Exhibit A" is a true copy of the said complaint; that thereafter the said John A. Shields duly issued his warrant of arrest, which said warrant was delivered to the United States marshal for the Southern District of New York, who thereupon deputized one Edward J. Brennan, who is also a special agent of the Department of Justice, to execute the said warrant; that annexed hereto and made a part hereof and marked "Exhibit B" is a true copy of the said warrant; that thereafter and on the said 20th day of February, 1911, the said Edward J. Brennan, together with certain other agents and employees of the Department of Justice, and together with the said John M. Williams, inspector of customs as aforesaid, duly proceeded to the premises known as No. 465 Broome Street, in the city of New York, and thereafter, under and by virtue of the authority of the said warrant of arrest, duly and in accordance with law placed the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, the above-named defendants, under arrest and duly conveyed them to the United States court and post-office building.

That at the time of making the said arrest the said Edward J. Brennan and the said other agents and employees of the
16 United States did duly and in manner and form authorized by law take into their custody and possession certain books and papers which were and are and do contain evidence of the commission of a crime against the United States by the said defendants, by reason of the commission of which crime said defendants were lawfully apprehended as aforesaid; that the said books and papers were thereupon taken by the said Edward J. Brennan to the United States court and post-office building and were delivered into the lawful custody and possession of this deponent and now are in the official custody and possession of this deponent.

Deponent further says that on the said 20th day of February, 1911, complaint was made before the grand jury of the United States for this district that the said defendants were and had been for some time engaged in the persistent practice of defrauding the United States out of a portion of its revenue due as customs duties upon merchandise imported into the United States from a foreign country by the said defendants; that evidence touching and concerning the said alleged violations of the United States criminal laws relating to the collection of customs and other laws was adduced before the said grand jury, which duly found an indictment against the said defendants; that the said indictment was returned into court on the said 20th day of February, 1911, and a bench warrant duly issued thereon; that the said defendants were thereupon duly taken into custody by the United States marshal for the Southern District of New York upon the said bench warrant, and on the said 20th day of February, 1911, were duly arraigned upon the said
17 indictment and held by the court to bail to answer the same; that the said Lawrence H. Mills and the said Charles G. Mourraille were held in the sum of seventy-five hundred dollars each and the said Emil S. Duflot was held in the sum of twelve thousand dollars.

At the time of the arrest of the defendants and down to this date the grand jury has been engaged in the investigation of the fraudulent practices of said defendants in respect to the customs, which said investigation has continued since the filing of the indictment herein, and at the time of the service of the order to show cause herein deponent was about to present to the grand jury the books and papers as evidence of further offences, as to which he is prepared to advise the grand jury that further indictments, charging additional offences than those contained in the indictment already found, could be found.

Deponent further says that on the 23rd day of February, 1911, the said Lawrence H. Mills, together with A. Leo Everett, one of the attorneys of the said defendants, made an examination of the said books and papers and selected and set apart therefrom all of the same which relate to and concern the current transactions of the said defendants in their business; that this deponent thereupon vol-

untarily surrendered and returned to the said Lawrence H. Mills all of the said papers so selected and set apart relating to the current business of the said defendants, together with certain other books and papers which were in the possession of this deponent and did not relate to or concern the charges of crime now pending in this
18 court against said defendants and before the grand jury of this court against the said defendants.

Deponent further says that all of the books and papers which were taken into the possession of the said arresting officers as above stated and now remain in the possession of this deponent are and contain competent and relevant evidence of the commission of offences against the customs laws of the United States by the said defendants and each of them, and reasonably bear upon and relate to the said charges of crime now pending against the said defendant as aforesaid, and are and will be in all reasonable probability necessary to the proof of the said crimes upon the trial of the said defendant therefor; that the said books and papers will be diligently and expeditiously investigated and examined by this deponent, and in the event that any other part thereof seems to this deponent not to relate to the said charges against the said defendants or not to be necessary to the proof thereof, this deponent will voluntarily surrender and return the same to the said defendants.

Broadly speaking, the crimes of fraud charged against the defendants which were the basis of the complaint upon which the commissioner's warrant was issued, upon which one indictment has already been found, and which are the basis upon which the further investigation before the grand jury is proceeding, were accomplished and were conspired to be accomplished by means of consular invoices, which fraudulently understated the true purchase price of articles fraudulently imported, and private invoices which surreptitiously stated the true purchase price of such articles; and these two
19 sets of invoices or copies thereof, which constitute the very instruments of the crimes charged against the defendants, are among the books and papers which were taken at the time of the arrest of the defendants and are now retained for the necessary purpose of the prosecution in my official custody.

Deponent further says that all of the said papers and documents in the possession of deponent are and will be at all times accessible to the said defendants within such reasonable limits as the necessities of the Government in the preparation of its case for trial impose.

Deponent further says that in no event will the papers referred to as being in the possession of this deponent be longer detained by this deponent than the demands of justice reasonably require.

Deponent further says that he has probably cause to believe, and does in truth and in fact verily believe, that the said defendants, and each of them, are guilty of the offences with which they are charged in the said indictment and of other and further offences in violation of the laws of the United States; that this deponent is in possession of a certain letter (hereto annexed as "Exhibit C"), written by

Emil S. Duflot, one of the said defendants, in which the said Duflot instructs his agents and representatives in Paris as to the manner and form in which said agents should undervalue the merchandise which was then and there being imported into the United
20 States by the said defendants; that on the said 20th day of February, 1911, the said Emil S. Duflot did admit to the said John M. Williams, prior to the time of his said arrest as above stated, that he had written the said letter and that the same was signed by him; that the books and papers now in the possession of this deponent set forth and establish the details of the practice adopted by the said defendants in their scheme to defraud the United States of a portion of its customs duties upon the said imported merchandise.

That the sources of deponent's information and the grounds of his belief are official investigations of this deponent and statements made to this deponent by his duly authorized and appointed assistants and by the said John M. Williams.

(Sgd.) HENRY A. WISE.

Subscribed and sworn to before me this 4th day of March, 1911.

[SEAL.] (Sgd.) FRED L. CAMPBELL,
Notary Public.

21 EXHIBIT A.

Before John A. Shields, U. S. commissioner, Southern District of New York.

UNITED STATES *vs.* LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, EMIL S. DUFLOT.	Conspiracy to defraud the United States. Sec. 544, U. S. R. S. Sec. 9, customs administrative act.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John M. Williams, being duly sworn, deposes and says: I am an inspector of customs of the United States at the port and collection district of New York.

Upon information and belief I say that on the first day of October, 1909, at the city and county of New York and within the jurisdiction of this court, Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot did unlawfully, willfully, knowingly, and feloniously conspire with each other, and with divers other persons unknown, to defraud the United States of lawful money due and thereafter to become due to the United States as a portion of the customs duties upon certain merchandise subject to duty by law imported into the United States from a foreign country, to wit, France, by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, who were engaged in business in the said city and county of New York under the name and style of "Mills and Duflot"; that the object of said conspiracy

was to be effected by presenting to the collector of customs at the port of New York fraudulent and false invoices, affidavits,
22 statements, and declarations in connection with and relating to the said imported merchandise, which was to be thereafter entered into the commerce of the United States at the said port of New York.

That to effect the object of the said conspiracy and pursuant thereto said Lawrence H. Mills, on the 3rd day of December, 1909, subscribed and made a declaration of owner forming a part of and contained in a certain written entry of imported merchandise presented to the collector of customs at the port of New York by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, under the by the name and style of "Mills & Duflot," which said written entry referred to and embraced one case of veilings theretofore imported from a foreign country, to wit, France, on the 3rd day of December, 1909, in the steamship "Adriatic," and marked "$\frac{PR}{R}$ 173," and was given the serial number 304243 by the said collector of customs.

The sources of my information and the ground of my belief as to the facts herein recited are the official records remaining on file in the office of the said collector of customs and documentary evidence in relation thereto and statements made by witnesses whose names can not now be disclosed without impeding the administration of justice, but who can be produced at the proper times and places.

JOHN M. WILLIAMS.

Subscribed and sworn to before me this 18th day of February, 1911.

[SEAL.] (Sgd.) JOHN A. SHIELDS,
U. S. Com.

23 EXHIBIT B.

To the marshal of the United States for the Southern District of New York and to his deputies, or any or either of them:

Whereas at a Circuit Court of the United States of America for the Southern District of New York, in the second circuit, begun and held at the Borough of Manhattan, in the city of New York, within and for the district and circuit aforesaid, on the 20th of February, in the year of our Lord one thousand nine hundred and eleven, the grand jurors in and for the said district and circuit brought into the said court a true bill of indictment against Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for having on the 3rd day of December, 1906, at the Southern District of New York and within the jurisdiction of this court, imported certain merchandise subject to the payment of duty by law from a foreign country, to wit, France, said merchandise being consigned to the said defendants under the name and style of "Mills & Duflot and consisting of cer-

tain veiling contained in a case marked "P P. 173," whereby the United States was deprived of a portion of the lawful duties accruing upon the said merchandise by means of a false and fraudulent invoice, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided, as by the said indictment, now remaining on file and of record in the said court, may more fully appear;
24 to which indictment the said Lawrence H. Mills, Charles G. Mourraille, & Emils S. Duflot have not yet appeared or pleaded.

Now, therefore you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Lawrence H. Mills, Charles G. Mouraille, & Emil S. Duflot, and then bring before the said court at the U. S. court and post-office building, in the city of New York, to answer the indictment aforesaid.

Witness the Honorable Edward D. White, Chief Justice of the United States, at the Borough of Manhattan, in the city of New York, the 20th day of Feby, in the year of our Lord one thousand nine hundred and eleven.

JOHN A. SHIELDS,
Clerk.

HENRY A. WISE,
U. S. Attorney.

25 EXHIBIT C.

L. H. MILLS. C. G. MOURRAILLE.

MILLS & DUFLOT,
CHIFFONS, NETTINGS, JAPANESE AND EUROPEAN SILKS,
469–471 Broome Street.

NEW YORK, *February 5, 1909.*

Mr. P. RAVIER,
Paris, France.

DEAR SIR: We confirm exchange of cable.

Regarding your inquiry about Martin, we wired you to ship what you have in stock, and hope they will go forward at once. You might bear in mind that orders placed in October and November and which are not in New York by the 1st of February are always liable to be cancelled. If our customers have not the goods to show when the trade is in town they are unable to sell until the following season.

Doning.—We confirmed the order at 1 fr. 15, which is more than we wanted to pay. You have the shades, and you may ship them in lots of about 25 pieces as they come off the loom. We enclose herewith confirmation.

Tosca nets.—We reordered qual. 271/1286. We used two words on this quality number instead of one, and this is very apt to cause complication.

We added that you should send us new samples in a small "reseau," and received your answer that you did not understand what it meant. If you had looked at the code, you would have seen that "label" means to "send more samples." You have a code, and we should like to use it as much as possible. As you write in
26 English, we thought you would understand what "smaller" meant. Consequently, we wired you back last night in plain language. We are preparing another code, which is very extensive, but we are so busy taking and filling orders that we have no time to finish it.

Rolandbart & Co.—We see no sign of your having recovered the difference due us. It makes us think more and more that paying cash is always a bad transaction. You must insist upon getting the difference for us at once.

Consular invoices.—You will either have to change your name or get somebody else to sign the invoices. You have undervalued in such a foolish way that the examiner informed us last week that if the invoices were not made more clearly and correctly, he would refuse to pass upon the goods, and we would have to wait weeks for the cases. You do not seem to realize that this is a very serious question. You will remember that at one time when the writer left Martin he told you what had to be done, and called your attention to the fact that exaggeration never works here. Please bear this in mind, and also that the percentage which I had given you is quite sufficient.

Furthermore, in the cases received this week you invoice the high-priced scarfs at full price, 25 frs., and others at 18 fr. you invoice at 7 fr. 50, or something like that. Now, in your estimation, is that not the most ridiculous thing that can be done?
27 No matter how little the examiner knows, he would certainly know that if one scarf is worth 25 frs., the other must be worth at least 15, if not 18, frs.

Really, if you do not give these consular invoices some of your personal attention, it is perfectly useless for us to go ahead, as for the sake of a few thousand francs we do not want to spoil our reputation and have a lot of difficulties with our other invoices. If it were not for the fact that the examiner is a friendly one, every yard of your goods would have been seized, we would have had to pay the duty just the same, and we would have had no goods either for the duty or the bills we have to pay in Paris.

Vous ne controllez les factures. Martin facture "4256" at 25 f., le prix en est de 12 et les autres livraisous sont bien facturies a' 12 f!

Mous commettous ce soir patron 8170 30 pas noir pour lioraison rapide.

Sincere salutations, MILLS & DUFLOT.

28 EXHIBIT F.

United States Circuit Court, Southern District of New York.

In the matter of the petition of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for an order to show cause why certain books and papers seized at the time of the petitioners' arrest should not be surrendered to said petitioners.

Now comes Henry A. Wise, United States attorney for the Southern District of New York, and respectfully represents to this court:

That he has read and considered the opinion filed by this court on March 8, 1911, in the proceeding herein and the order entered thereon on March 15th, 1911, directing him to turn over all the books and papers now in his possession taken at the time of the arrest of the petitioners, Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot (hereinafter called defendants). Referring to said opinion, in which it is stated by the court that "there has been a general seizure of all the defendants' business records," the said United States attorney begs leave to state that at the time of the arrest of said defendants only such books and papers were seized by the arresting officer as at the time were believed reasonably to relate to the proof of the offence charged against the said defendants, and that subsequently such books and papers as did not relate to the proof of the said charge were voluntarily surrendered by the United States
29 attorney to the said defendants, as hereinafter set forth; that it now appears that two certain volumes containing papers relating to certain business transactions of the said defendants do not bear upon the charge for which said defendants were arrested as aforesaid, and these two volumes the United States attorney has this day returned to said defendants, to wit, "Acc. 200, volume 2," and "Price Lists, Paris, Berlin, 7."

As to the direction of this court to turn over the other books and papers now in his possession and taken into custody at the time of the arrest of the defendants, said United States attorney is unwilling and respectfully refuses to comply with said order, and the grounds of his refusal to obey the said order are as follows:

I. On February 20, 1911, complaint was duly made under oath before John A. Shields, one of the United States commissioners for the Southern District of New York, by John M. Williams, inspector of customs of the United States, charging the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot with the crime of conspiracy to defraud the United States of money due and to become due to the United States as a portion of the customs duties upon certain merchandise to be imported into the United States from a foreign country; that annexed hereto and made a part hereof, marked "Exhibit A," is a true copy of said complaint; that thereafter the said John A. Shields, as said United States commissioner, duly issued his warrant of arrest, which said warrant was delivered to the

United States marshal for the Southern District of New York, who thereupon deputized one Edward J. Brennan to execute
30 said warrant, annexed hereto and made a part hereof, marked "Exhibit B," is a true copy of said warrant. That thereafter on the 20th day of February, 1911, the said Edward J. Brennan proceeded to the premises known as 465 Broome Street, Borough of Manhattan, city of New York, and entered, and by virtue of the lawful authority of said warrant of arrest duly, and in accordance with law, placed the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot under arrest, and duly conveyed them to the United States court and post-office building.

II. At the time of making said arrest the said officer of the United States did duly and in manner and form authorized by law take into his custody and possession certain books and papers which were and are and do contain evidence of a crime committed by said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, to wit, the crime charged in the said complaint, and for the commission of which crime said defendants were lawfully apprehended as aforesaid; and the said books and papers were thereupon taken by the said officer to the United States court and post-office building and were delivered into the lawful custody and possession of the United States attorney and are now in the official custody and possession of said United States attorney.

III. Thereafter on the 20th day of February, 1911, a complaint was made before the grand jury for this district, and said defendants were and had been for some time engaged in the persistent practice of defrauding the United States out of a portion of its revenue due as customs duties upon merchandise imported into the United
31 States from a foreign country; that upon evidence adduced before said grand jury an indictment was duly found against said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot; said indictment was handed into this court on said 20th day of February, 1911, and a bench warrant issued thereon; that said defendants were thereupon duly taken into custody by the United States marshal for this district upon said bench warrant, and on the said 20th day of February, 1911, were duly arraigned upon said indictment and held by this court upon bail to answer the same; that the crime charged in said indictment was the same crime as that as to which complaint was made before said United States commissioner and upon which said commissioner issued his warrant of arrest as aforesaid.

IV. The crimes and offences charged against said defendants which were the basis of the complaint upon which the commissioner's warrant was issued as aforesaid, and upon which said defendants were apprehended as aforesaid, and upon which the indictment as aforesaid was returned by the grand jury, were committed, and the said defendants did conspire to commit the said crimes and offences by means of consular invoices which fraudulently understated the

true purchase price of articles fraudulently imported into the United States, and by means of private invoices which surreptitiously stated the true purchase price of said articles; and these two sets of invoices or copies thereof, which are deemed by the United States attorney to constitute instruments of the very crimes and offences charged against said defendants, are among the books and papers which were taken at the time of the arrest of the defendants and are now
32 retained, for the necessary purpose of prosecution, in the official custody of said United States attorney.

V. All of the said books and papers now in the custody of the United States attorney are and contain competent and relevant evidence establishing the commission of the very crimes and offences against the laws of the United States by said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, and each of them, for which the said commissioner issued his warrant of arrest and for which the said grand jury duly returned its indictment as aforesaid, and they reasonably bear upon and relate to the very said charges of crime against said defendants as aforesaid, and are, and in all reasonable probability will be, necessary to the proof of said crimes upon the trial of said defendants therefor; that the books and papers now in the possession of the United States attorney set forth and establish the details of the fraudulent practice adopted by said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot in their scheme and conspiracy to defraud the United States of a portion of its customs duties which were the basis of said complaint upon which said defendants were arrested and for which they were subsequently indicted as aforesaid.

VI. The United States attorney has probable cause to believe, and does in truth and in fact verily believe, that said defendants and each of them are guilty of the crime for which they were apprehended as aforesaid and with which they are charged in said indictment; that the United States attorney is in possession of a certain letter
33 dated February 5, 1909 (made a part hereof and a copy of which is hereto annexed, marked "Exhibit C"), sent by Mills & Duflot, that being the firm name of said defendants, in which said defendants instruct their agent in Paris as to the manner and form in which said agent should undervalue the merchandise which was then and there being imported into the United States by said defendants; that on said 20th day of February, 1911, upon being apprehended as aforesaid, said Emil S. Duflot, one of the defendants, admitted the authenticity of said letter, and that the same was signed by him; that the books and papers now in the possession of the said United States attorney set forth and establish the details of the practice adopted by said defendants in their scheme to defraud the United States, as outlined in said letter of February 5, 1909 (Exhibit C).

VII. The United States attorney on the 23rd day of February, 1911, voluntarily permitted the said Lawrence H. Mills and his counsel to examine said books and papers and voluntarily surrendered

and returned to said Mills such few books and papers as were taken which related to the current business of said defendants, and papers which careful examination disclosed did not actually relate to or concern the crime charged against said defendants.

VIII. All of the said books and papers now in the custody of the United States attorney are at all times accessible to and subject to examination by said defendants or their attorneys for the due preparation of their case.

IX. In no event will any of the books or papers taken into
34 possession at the time of defendants' arrest and now in the custody of the United States attorney be detained longer than the demands of the prosecution now pending against these defendants reasonably require.

X. The number of books and papers taken into possession at the time of the defendants' arrest and now in the custody of the United States attorney did not constitute "a general seizure of all the defendants' business records;" in fact, the books so taken and now detained constitute a very small part of the business records of said defendants, insignificant as compared with all the records at the premises of the defendants at the time of their arrest. Only such of their books and papers were taken at the time of the arrest as were believed reasonably to relate to the crime for which the arrest was made. Annexed hereto and made a part hereof, marked "Exhibit D," is a list and brief description of the books and papers taken at the time of the arrest of defendants and now detained by the United States attorney.

XI. For the foregoing reasons and in view of the grave importance to the public interest of the question at issue the United States attorney, with due respect to the court, feels constrained to refuse to comply with said order of this court until a final determination on appeal of the question involved.

Respectfully submitted.

(Sgd.) HENRY A. WISE.

35 STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Henry A. Wise, being duly sworn, deposes and says that he is United States attorney for the Southern District of New York; that the foregoing statement is true to his own knowledge and belief.

The sources of his information and the grounds of his belief are official investigations made by him and official reports made to him in respect to the matters herein above set forth.

(Sgd.) HENRY A. WISE.

Sworn to before me this 14th day of March, 1911.

[SEAL.] (Sgd.) FRED L. CAMPBELL,
Notary Public.

36 EXHIBIT A.

Before John A. Shields, U. S. commissioner, Southern District of New York.

UNITED STATES *vs.* LAWRENCE H. MILLS, CHARLES G. Mourraille, Emil S. Duflot.	Conspiracy to defraud the United States. Sec. 544, U. S. R. S. Sec. 9, customs administrative act.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John M. Williams, being duly sworn, deposes and says: I am an inspector of customs of the United States at the port and collection district of New York.

Upon information and belief, I say that on the first day of October, 1909, at the city and county of New York and within the jurisdiction of this court, Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot did unlawfully, willfully, knowingly, and feloniously conspire with each other and with divers other persons unknown to defraud the United States of lawful money due and thereafter to become due to the United States as a portion of the customs duties upon certain merchandise subject to duty by law, imported into the United States from a foreign country, to wit, France, by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, who were engaged in business in the said city and county of New York under the name and style of "Mills and Duflot;" that the object of said conspiracy was to be effected by presenting to the collector of customs at the port of New York fraudulent and false
37 invoices, affidavits, statements, and declarations in connection with and relating to the said imported merchandise, which was to be thereafter entered into the commerce of the United States at the said port of New York.

That to effect the object of the said conspiracy and pursuant thereto, said Lawrence H. Mills, on the 3rd day of December, 1909, subscribed and made a declaration of owner, forming a part of and contained in a certain written entry of imported merchandise presented to the collector of customs at the port of New York by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, under and by the name and style of "Mills & Duflot," which said written entry referred to and embraced one case of veilings theretofore imported from a foreign country, to wit, France, on the 3rd day of December, 1909, in the steamship "Adriatic" and marked "$^{P}_{R}{}^{R}$ 173," and was given the serial number 304243 by the said collector of customs.

The sources of my information and the ground of my belief as to the facts herein recited are the official records remaining on file in the office of the said collector of customs and documentary evidence in relation thereto and statements made by witnesses whose names

can not now be disclosed without impeding the administration of justice, but who can be produced at the proper times and places.

JOHN M. WILLIAMS.

Subscribed and sworn to before me this 18th day of February, 1911.

[SEAL.] (Sgd.) JOHN A. SHIELDS,
U. S. Com.

38 EXHIBIT B.

To the marshal of the United States for the Southern District of New York and to his deputies or any or either of them:

Whereas at a Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the Borough of Manhattan, in the city of New York, within and for the district and circuit aforesaid, on the 20th of February in the year of our Lord one thousand nine hundred and eleven, the grand jurors in and for the said district and circuit brought into the said court a true bill of indictment against Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for having on the 3rd day of December, 1906, at the Southern District of New York and within the jurisdiction of this court, imported certain merchandise subject to the payment of duty by law from a foreign country—to wit, France—said merchandise being consigned to the said defendants under the name and style of "Mills & Duflot" and consisting of certain veiling contained in a case marked "P P. 173," whereby the United States was deprived of a portion of the lawful duties accruing upon the said merchandise by means of a false and fraudulent invoice; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided, as by said indictment, now remaining
39 on file and of record in the said court, may more fully appear; to which indictment the said Lawrence H. Mills, Charles G. Mourraille, & Emil S. Duflot have not yet appeared or pleaded.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Lawrence H. Mills, Charles G. Mourraille, & Emil S. Duflot and then bring before the said court, at the U. S. court and post-office building, in the city of New York, to answer the indictment aforesaid.

Witness, the Honorable Edward D. White, Chief Justice of the United States, at the Borough of Manhattan, in the city of New York, the 20th day of Feby. in the year of our Lord one thousand nine hundred and eleven.

JOHN A. SHIELDS,
Clerk.

HENRY A. WISE,
U. S. Attorney.

40 EXHIBIT D.

"1 File. Copies of Foreign Orders" Feby. 27/09 to Jany. 4, 1910.
"3 File. Copies of Foreign Orders" Oct. 3/08 to Sept. 27, 1910.
"4 File. Copies of Foreign Orders" Oct. 5/1910 to Feby. 7, 1911.
"6 File. Paris Invoices and Duty Bills" Aug. 19/08 to Jan. 12/11.
"10 File. Lyons Invoices" May 19/09 to Nov. 10, 1910.
"12 File. Copy of order" Jany. 27/09. Rest of papers torn out.
"13 File. Lyons Orders" August 6, 1910 to Feby. 4, 1911.
"14 File. Lyons Invoices" Oct. 19, 1910 to Dec. 6, 1910.
"150 Ledger. Personal accounts" Dec/05 to Dec. 8, 1910.
"250 Journal. Personal accounts" Dec./05 to Dec. 8, 1910.
"300 Ledger"
"400 Ledger"
"A File. Foreign Receipts" Jany 1/07 to Jany. 21, 1911.
"B File. Letters and Paris Invoices" Oct./08 to Dec. 5, 1910.
"C Ledger Sheets, covering various foreign accounts" May/06 to April, 1910.
"D File. Foreign Bills & Bills of lading" Feby. 10 to Dec. 31/10.
"E Receipts for foreign drafts" Dec. 31/08 to Feby. 10, 1911.
"F File. Zurich letters & invoices" May 30/08 to Jany. 5, 1911.
"G Paris Letters invoices & ledger sheets" Feby. 1909 to Jan. 23/11.
"H File. Bills to L. H. Mills" Jany. 3/02 to Oct. 25/05.
"I File. Foreign bills & letters" Jany. 12/09 to March 11, 1910.
"J File. Bills & Letters to L. H. Mills" April 27/03 to Aug. 31/08.
"K Cable Book" Oct. 28, 1910 to Feby. 16, 1911.
"L Press Copy Letter Book" Feby. 27/05 to Nov. 23/10 (foreign prices)
"M Press Copy Letter Book" Nov. 18, 1899 to June 21, 1909.
"N Press Copy Letter Book" July 26/01 to July 12, 1910.
"O Press Copy Letter Book" Oct. 28/09 to Dec. 1/09.
P Box containing letters & statements July 15/07 to Jan. 17/11
Q Check Book May 21/09 to Feby. 28, 1911.

41 EXHIBIT G.

United States Circuit Court, Southern District of New York.

In the matter of the petition of Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot for an order to show cause why certain books and papers seized at the time of the petitioners' arrest should not be surrendered to said petitioners.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Lawrence Heyworth Mills, being duly sworn, deposes and says:

That he is one of the defendants herein and has read the answer of Henry A. Wise, verified March 14, 1911, being the answer to an order

entered herein March 14th, 1911, directing him to turn over certain books and papers to deponent and the other defendants herein; that inasmuch as there appears some contradiction between the original petition of deponent and said answer of Henry A. Wise as to the nature and number of the books used by defendants in their business, deponent states: That the business of defendants consists of importing merchandise in large quantities and from a few manufacturers and selling them in the United States to a very large number of jobbers and dry-goods merchants; that the United States marshal, upon February 20th, 1911, in making the seizure referred to, did not seize the books and papers relating to the selling department of de-
42 fendants' business, which constitutes in bulk the larger part of the books and records of the firm.

It is still true, however, as stated in the original petition herein, that the marshal seized substantially all of the books and papers used in the business of importing silks and other dry goods.

The business is conducted with Zurich, Switzerland; Lyons and Paris and Japan.

The books and papers relating to the European importations were substantially all taken.

The indictment herein has to do exclusively with shipments from Paris which constitute in value less than 10% of the total importations made by the defendants.

LAWRENCE HEYWORTH MILLS.

Sworn to before me this 14th day of March, 1911.

[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

(Cert. filed in N. Y. Co.)

U. S. Circuit Court, Southern District of N. Y. Filed Mar. 15, 1911. John A. Shields, Clerk.

43 *Return to writ of habeas corpus.*

United States Circuit Court, Southern District of New York.

In the matter of the petition of Henry A. Wise, United States attorney, for a writ of habeas corpus.

To the Circuit Court of the United States for the Southern District of New York:

In obedience to the writ of habeas corpus hereto annexed, I certify and return that on the 15th day of March, 1911, and at the time the said writ of habeas corpus, and a copy of the petition upon which the said writ was allowed, was served upon me, the said Henry A. Wise was in my custody and detained by me by virtue of a certain writ of commitment issued out of the Circuit Court of the United States for the Southern District of New York, as is more fully set forth in the said writ of commitment; that a true and correct copy of said writ of

commitment is annexed to the said petition marked "Exhibit A;" that the said writ of habeas corpus was granted upon said petition, which said petition was filed in the office of the clerk of this court on the 15th day of March, 1911; that the facts set forth in said petition are true to the best of my knowledge and belief; that thereafter, on the 15th day of March, 1911, the aforesaid writ of habeas corpus, together with a copy of the petition upon which the same was allowed as aforesaid was served upon me; and that after the said writ of habeas corpus had been served upon me as aforesaid, in compliance with the direction of the Honorable Henry G. Ward, United States circuit judge, which direction was annexed to the
44 aforesaid writ of habeas corpus, the said Henry A. Wise was enlarged upon his own recognizance pending the proceedings upon the said writ of habeas corpus.

And I do further certify that I have now here the body of said Henry A. Wise as by said writ I am commanded.

Dated New York, March 12, 1911.

WILLIAM HENKEL,
United States Marshal for the Southern District of New York.

U. S. Circuit Court, Southern District of N. Y. Filed Mar. 16, 1911. John A. Shields, clerk.

45 *Order discharging writ.*

United States Circuit Court, Southern District of New York.

In the matter of the petition of Henry A. Wise, United States attorney, for a writ of habeas corpus.

On reading and filing the petition of the above named Henry A. Wise, verified the 15th day of March, 1911, for a writ of habeas corpus, the writ of habeas corpus issued thereon on the 15th day of March, 1911, directed to William Henkel, United States marshal for the Southern District of New York, the return to the said writ made by the said United States marshal on the 15th day of March, 1911, and petitioner having been duly produced before this court in obedience to said writ of habeas corpus, and a motion for the petitioner's discharge having duly come on to be heard,

Now, after hearing counsel for the respective parties, and due deliberation having been had in the premises, it is

Ordered, that the said writ of habeas corpus be, and the same is hereby, dismissed and discharged, and that the petitioner be, and he hereby is, remanded to the custody of the marshal.

Dated New York, March 6th, 1911.

Enter:

H. G. WARD,
United States Judge.

U. S. Circuit Court, Southern District of N. Y. Filed Mar. 16, 1911. John A. Shields, clerk.

46 *Notice of appeal.*

Circuit Court of the United States, Southern District of New York.

In the matter of the application of Henry A. Wise for a writ of habeas corpus.

SIRS: Please take notice that Henry A. Wise, United States attorney, petitioner above named, hereby appeals to the Supreme Court of the United States from the final order made and entered herein on the 16th day of March, 1911, discharging the writ of habeas corpus herein, and from each and every part of the said order.

HENRY A. WISE, *U. S. Atty.*

To Everett, Clarke, Benedict & Ward, Esqrs., 79 Wall Street, Attys. for Mills, Mourraille & Duflot.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, Mar. 16, 1911. Everett, Clarke, Benedict & Ward, attorneys for Mills, Mourraille & Duflor. U. S. Circuit Court, Southern District N. Y. Filed Mar. 16, 1911. John A. Shields, clerk.

47 *Petition for appeal and allowance.*

Circuit Court of the United States, Southern District of New York.

In the matter of the application of Henry A. Wise for a writ of habeas corpus.

Henry A. Wise, feeling aggrieved by order of this court made on the 15th day of March, 1911, dismissing the writ of habeas corpus heretofore allowed, comes now in his own person and as United States attorney and petitions this court for an order allowing him to prosecute an appeal from the said final order to the Supreme Court of the United States according to the laws of the United States in that behalf made.

Your petitioner feels there are grave doubts concerning the legality under the Constitution of the United States of his imprisonment and detention under the commitment of this court mentioned in his petition of the said writ and the validity and regularity of the proceedings referred to in the said petition, and he desires in good faith to submit these questions to the Supreme Court for their determination, and your petitioner will ever pray.

HENRY A. WISE,
Pro se and as United States Attorney for the Southern District of New York.

The foregoing appeal prayed for is hereby allowed, and the petitioner is enlarged on his own recognizance for his appearance to answer the judgment of the Supreme Court.

H. G. WARD, *U. S. C. J.*

Dated Mar. 16th, 1911.

48 (Endorsed:) Due service of a copy of the within is hereby admitted. New York, Mar. 16, 1911. Everett, Clarke, Benedict & Ward, attorney for Mills, Mourraille & Duflot. U. S. Circuit Court, Southern District N. Y. Filed Mar. 16, 1911. John A. Shields, clerk.

49 *Assignments of error.*

Circuit Court of the United States, Southern District of New York.

In the matter of the application of Henry A. Wise for a writ of habeas corpus.

Now comes the above-named Henry A. Wise, in his own person and as United States attorney, and files the following assignment of errors upon which he will rely upon the prosecution of the appeal sued out by him in the above-entitled proceeding to review the order entered on the 15" day of March, 1911, dismissing the writ of habeas corpus theretofore sued out by him, as follows:

I. That the said court erred in dismissing the said writ of habeas corpus by its order by which it was—

"Ordered that said writ of habeas corpus be, and the same hereby is, dismissed and said Henry A. Wise, United States attorney, remanded to the custody of said United States marshal."

II. That said court erred in not granting an order allowing said writ of habeas corpus and discharging said Henry A. Wise from custody.

III. The court erred in adjudging said Henry A. Wise to be guilty of contempt of court in not surrendering the said books and papers.

50 IV. The said court erred in refusing to grant an order ordering and adjudging that said Henry A. Wise was not in contempt of court in refusing to surrender the books and papers which came into his official custody as United States attorney.

V. The court erred in adjudging that the taking into custody of said books and papers at the time of the lawful arrest of said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot was in violation of the provisions of the Constitution of the United States.

VI. That the court erred in making the order of March 16th, 1911, directing the said Henry A. Wise to surrender books and papers which came into his official custody as United States attorney and which were taken in possession at the time of the arrest of Lawrence

H. Mills, Charles G. Mourraille, and Emil S. Duflot, as material evidence relating to the criminal charge for which they were arraigned.

And said Henry A. Wise, appellant, prays that the order entered herein on the 15th day of March, 1911, dismissing said writ of habeas corpus for the errors aforesaid, and other errors in the record and proceedings herein, may be reversed and altogether held for nothing, and that said court be directed to enter an order discharging said Henry A. Wise from custody forthwith.

Dated, New York, March 15, 1911.

HENRY A. WISE,
Pro se and United States Attorney for the Southern District of New York.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, Mar. 16, 1911. Everett, Clarke, Benedict & Ward, attorneys for Mills, Mourraille & Duflot. U. S. Circuit Court, Southern District N. Y. Filed Mar. 16, 1911. John A. Shields, Clerk.

51 By the Hon. E. Henry Lacombe, one of the judges of the Circuit Court of the United States, to William Henkel, United States marshal in and for the Southern District of New York:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the Capitol in the city of Washington, District of Columbia, on the 15th day of April, 1911, pursuant to a petition, allowance, and notice of appeal filed in the clerk's office in the Circuit Court of the United States for the Southern District of New York, wherein Henry A. Wise, United States attorney, is the appellant and you, the said marshal, appellee, to show cause, if any there be, why the final order of the said Circuit Court in such petition, allowance, and notice of appeal mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand in the Borough of Manhattan, city of New York, in the district and circuit above mentioned, on the 16th day of March, 1911.

H. G. WARD,
U. S. Circuit Judge.

53 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to fifty-two, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause entitled "In the matter of the application of Henry A. Wise for a writ of habeas corpus" as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District

of New York, in the Second Circuit, this 20th day of March, in th year of our Lord one thousand nine hundred and eleven, and of th independence of the said United States the one hundred and thirty fifth.

JOHN A. SHIELDS, *Clerk.*

(Indorsement on cover:) File No. 22585, S. New York, C. C. U. S Term No. 964. Henry A. Wise, individually and as United State attorney for the Southern District of New York, appellant, *vs* William Henkel, United States marshal in and for the Southern District of New York. Filed March 22d, 1911. File No. 22585.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 964.

HENRY A. WISE, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Stipulation to add to record	a	1
Stipulation as to record	1	1
Warrant and return	4	2
Indictment	7	3
Clerk's certificate	16	8

In the Supreme Court of the United States. October term, 1910.

HENRY A. WISE, INDIVIDUALLY AND AS UNITED States attorney for the Southern District of New York, appellant,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL IN and for the Southern District of New York.
No. 964.

Stipulation to add to record on file.

It is hereby stipulated by and between the respective parties in the above entitled case that the matter attached to this stipulation may be added to the transcript of the record heretofore filed, and printed as a part thereof.

F. W. LEHMANN,
Solicitor General.
A. LEO EVERETT,
Counsel for Appellee.

United States Circuit Court, Southern District of New York.

In the matter of the application of Henry A. Wise, United States attorney, for a writ of habeas corpus.

The following is hereby stipulated and agreed by and between the counsel for the respective parties with reference to the transcript of record herein certified to the Supreme Court of the United States:

I. That the arrest of the defendants herein was made by virtue and under the authority of a warrant of arrest duly issued by John A. Shields, United States commissioner for the Southern District of New York, on the 20th day of February, 1911, and that the books and papers herein were taken in custody by a duly deputized United States marshal at the time of lawfully executing said warrant of the United States commissioner.

II. That the warrant of arrest under which the taking into custody of the books and papers herein issued is sought to be justified in the statement and affidavit of United States Attorney Wise, dated, respectively, the 4th day of March, 1911, and the 14th day of March, 1911, is the warrant of arrest of Commissioner Shields hereinabove referred to and not the warrant referred to as Exhibit B in said affidavit and statement.

III. That after the making of the complaint before the United States commissioner against said defendants and the execution of the warrant of arrest issued by said commissioner herein referred to, the defendants were, on February 20, 1911, indicted by the grand jury for the Southern District of New York.

IV. That a bench warrant was issued upon such indictments, and it is this warrant which is referred to in the affidavit and statement of United States Attorney Wise and annexed thereto as Exhibit B. At the time this bench warrant was issued the defendants had already been taken into lawful custody under the aforesaid commissioner's warrant dated February 20, 1911, issued upon a complaint made to him, and the books and papers referred to had already been taken into possession by the marshal in the execution of said commissioner's warrant.

V. That the commissioner's warrant and the indictment above referred to have been omitted from the record heretofore certified to the Supreme Court.

VI. That the commissioner's warrant dated February 20,
3 1911, and the indictment found February 20, 1911, be certified and forwarded to form part of the transcript of record upon the appeal herein.

Dated New York, April 4, 1911.

HENRY A. WISE, *United States Attorney.*
EVERETT, CLARKE, BENEDICT & WARD,
Attorney for Mills, Mourraille, and Duflot.

So ordered.

——— HAND, *U. S. Judge.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Apr. 4, 1911. John A. Shields, clerk.

4 *The President of the United States of America to the marshal of the United States for the Southern District of New York and to his deputies or any or either of them:*

Whereas complaint on oath hath been made to me, charging that Lawrence H. Mills, Charles G. Mouraille, Emil S. Duflot did, on or about the first day of October, in the year one thousand nine hundred and nine, at the Southern District of New York and within the jurisdiction of this court, Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, unlawfully, willfully, knowingly, and feloniously, conspire with each other and with divers other persons unknown to defraud the United States of lawful money due, and thereafter to become due, to the United States as a portion of the customs duties upon certain merchandise, subject to duty by law, imported and thereafter to be imported into the United States from a foreign country, to wit, France, by the said Lawrence H. Mills, Charles G. Mouraille, and Emil S. Duflot, who were engaged in business in the city and county of New York under the name and style of "Mills & Duflot"; that the object of said conspiracy was to be effected by presenting to the collector of customs at the port of New York fraudulent and false invoices, affidavits, statements, and declarations in connection with and relating to the said imported merchandise which was to be thereafter entered into the commerce of the United

5 States at the said port of New York—as by reference to a certified copy of the complaint hereto annexed will more fully and at large appear—against the peace of the United States and their dignity and against the form of the statute of the United States in such case made and provided.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Lawrence H. Mills, Charles G. Mouraille, and Emil S. Duflot and bring their bodies forthwith before me, or some judge or justice of the United States, wherever in the State of New York they may be found, that they may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 20th day of February, in he year of our Lord one thousand nine hundred and eleven.

[SEAL.]

JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

HENRY A. WISE,
United States Attorney.

6 (Endorsements:) Conspiracy to defraud the United States. Sec. 5440, U. S. R. S.; sec. 9, customs administrative act. U. S. Circuit Court.—The United States of America vs. Lawrence H. Mills, Charles G. Mouraille & Emil S. Duflot.—Warrant to apprehend.—Henry A. Wise, United States Attorney.—I hereby depute McEnany Kopp Hecht to execute the within process. Dated New York, Feb'y 20th, 1911. Wm. Henkel, U. S. marshal.—16244—16245—16246.

Received this warrant on the 20th day of Feb'y, 1911, at New York City and executed the same by arresting the within-named Lawrence H. Mills, Charles Mouraille, Emil S. Duflot at New York City on the 20 day of Feb., 1911, and have their bodies now in court as within I am commanded.

WM. HENKEL, *U. S. Marshal.*

FEB. 20/11.

Three defendants br't before me.—Complaint superseded by indictment & defts. discharged on within warrant.

JOHN A. SHIELDS, *U. S. Commr.*

7 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the second day of January, in the year of our Lord one thousand nine hundred and eleven, and continued by adjournment to and including the twentieth day of February, in the year of our Lord one thousand nine hundred and eleven.

Southern district of New York, ss: The jurors of the United States of America within and for the district and circuit aforesaid, on their oath, present that at all the times hereinafter mentioned Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot (hereinafter called and referred to as the defendants) were doing business in the city of New York, in the county and Southern District of New York, as a firm and copartnership under and by the firm name and style of "Mills and Duflot," and were engaged, among other things, in importing into the commerce of the United States at the port of New York from a foreign country divers goods, wares, and merchandise; that on the third day of December, in the year nineteen hundred and nine, certain imported merchandise subject to the payment of duty by law arrived at the port of New York from a foreign country, to wit, from France, on the steamship "Adriatic," said merchandise being consigned to the said defendants under the name and style of "Mills and Duflot," and consisting of certain veiling contained

8 in a case marked "P ◇R◇ P 173"; that thereafter, on the third day of December, in the year nineteen hundred and nine, the said defendants, under and by the name and style of "Mills and Duflot," did unlawfully, knowingly, wilfully, and feloniously make and attempt to make an entry of the said imported merchandise into the commerce of the United States at the said port and Southern District of New York and within the jurisdiction of this court by means of a certain fraudulent and false invoice thereof and a fraudulent and false written statement, hereinafter more particularly referred to and described; that on the said third day of December, in the year nineteen hundred and nine, the said defendants, under the name and style of "Mills and Duflot," did present to the collector of customs at and for the port and collection district of New York a certain fraudulent and false written entry of the said imported merchandise, to wit, of the said veiling, which said written entry the said collector did thereupon designate with and by the serial number 304243; that on the said third day of December, in the year nineteen hundred and nine, the said defendants, under and by the name and style of "Mills and Duflot," did present the said certain fraudulent and false invoice of the said merchandise to the said collector of customs, and the said collector did thereupon designate said fraudulent and false invoice by the serial number 2885.

And the jurors aforesaid do further say that the said invoice, designated number 2885 as aforesaid, was fraudulent and false in the following particulars; that is to say, that the same stated the actual cost of the said imported merchandise contained in the said case marked as aforesaid to be francs 548.20, whereas in truth and in fact the actual cost of the said merchandise was francs 636.95, as the said defendants then and there well and truly knew; and the said

9 invoice was fraudulent and false in the further particular that it contained a statement and declaration by one A. Roux, who was acting in that behalf as the agent of the said firm of Mills and

Duflot; that no different invoice of the merchandise mentioned in said invoice had been or would be furnished to anyone, whereas in truth and in fact another and different invoice of the said merchandise had been and would be furnished to the said defendants, as the said defendants then and there well and truly knew;

And the jurors do further say that the said written entry, designated number 304243 as aforesaid, was fraudulent and false in that it contained a statement and declaration by the said Lawrence H. Mills, one of the said defendants, as the owner by purchase of the imported merchandise described in the said written entry and invoice, to the effect that the said invoice and entry contained a just and faithful account of the actual cost of the said merchandise, whereas in truth and in fact the actual cost of the said merchandise was more than the amount stated by the said invoice as hereinbefore set forth and stated, all as the said defendants then and there well and truly knew.

And the jurors do further say that by means of the said fraudulent and false written entry and the said fraudulent and false invoice said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot made and effected the entry into the United States and entered and introduced into the commerce of the United States at the port of New York and in the Southern District of New York and within the jurisdiction of this court, on the said third day of December, in the year of our Lord nineteen hundred and nine, the said imported merchandise at the cost and value stated in the said false and fraudulent invoice, and not at the actual cost and value of said merchandise as hereinabove stated, whereby the United States was deprived of a portion of the lawful duties accruing upon the said merchandise, to wit, at least the sum of ten dollars and twenty cents; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 9, customs administrative act.)

Second count.

And the jurors aforesaid, on their oath aforesaid, do further present that at all the times hereinafter mentioned Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot (hereinafter called and referred to as the defendants) were doing business in the city of New York, in the county and Southern District of New York, as a firm and copartnership under and by the firm name and style of "Mills and Duflot," and were engaged among other things in importing into the commerce of the United States at the port of New York from a foreign country divers goods, wares, and merchandise; that on the tenth day of December, in the year nineteen hundred and nine, certain imported merchandise subject to the payment of duty by law, arrived at the port of New York from a foreign country, to wit, from France, on the steamship "Majestic," said merchandise being consigned to the said defendants under the name and style of "Mills and Duflot" and consisting of certain veiling contained in a case marked "P ◇R◇ P 175"; that thereafter, on the eleventh day of December, in the year

nineteen hundred and nine, the said defendants, under and by the name and style of "Mills and Duflot," did unlawfully, knowingly, wilfully, and feloniously make and attempt to make an entry
11 of the said imported merchandise into the commerce of the United States at the said port and Southern District of New York and within the jurisdiction of this court by means of a certain fraudulent and false invoice thereof and a fraudulent and false written statement hereinafter more particularly referred to and described; that on the said eleventh day of December, in the year nineteen hundred and nine, the said defendants, under the name and style of "Mills and Duflot," did present to the collector of customs at and for the port and collection district of New York, a certain fraudulent and false written entry of the said imported merchandise, to wit, of the said veiling, which said written entry the said collector did thereupon designate with and by the serial number 311680; that on the said eleventh day of December, in the year nineteen hundred and nine, the said defendants, under and by the name and style of "Mills and Duflot," did present the said certain fraudulent and false invoice of the said merchandise to the said collector of customs, and the said collector did thereupon designate said fraudulent and false invoice by the serial number 12254.

And the jurors aforesaid do further say that the said invoice, designated number 12254, as aforesaid, was fraudulent and false in the following particulars; that is to say, that the same stated the actual cost of the said imported merchandise contained in the said case marked as aforesaid to be francs 1,632.21, whereas in truth and in fact the actual cost of the said merchandise was francs 1,855.75, as the said defendants then and there well and truly knew; and the said invoice was fraudulent and false in the further particular that it contained a statement and declaration by one A. Roux, who was acting in that behalf as the agent of the said firm of Mills and Duflot, that no different invoice of the merchandise mentioned in said
12 invoice had been or would be furnished to anyone, whereas in truth and in fact another and different invoice of the said merchandise had been and would be furnished to the said defendants, as the said defendants then and there well and truly knew.

And the jurors do further say that the said written entry designated number 311680 as aforesaid was fraudulent and false in that it contained a statement and declaration by the said Charles G. Mourraille, one of the said defendants, as the owner by purchase of the imported merchandise described in the said written entry and invoice, to the effect that the said invoice and entry contained a just and faithful account of the actual cost of the said merchandise, whereas in truth and in fact the actual cost of the said merchandise was more than the amount stated by the said invoice as hereinbefore set forth and stated, all as the said defendants then and there well and truly knew.

And the jurors do further say that by means of the said fraudulent and false written entry and the said fraudulent and false invoice

said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot made and effected the entry into the United States and entered and introduced into the commerce of the United States at the port of New York, and in the Southern District of New York, and within the jurisdiction of this court, on the said eleventh day of December, in the year nineteen hundred and nine, the said imported merchandise at the cost and value stated in the said false and fraudulent invoice, and not at the actual cost and value of said merchandise as hereinabove stated, whereby the United States was deprived of a portion of the lawful duties accruing upon the said merchandise, to wit, at least the sum of twenty-five dollars and eighty cents, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 9, customs administrative act.)

13 *Third count.*

And the jurors aforesaid, on their oath aforesaid, do further present that the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, late of the city and county of New York, in the district and circuit aforesaid, and divers other persons to the grand jurors unknown, heretofore, to wit, on the first day of October, in the year nineteen hundred and nine, at and within the Southern District of New York and within the jurisdiction of this court, did unlawfully, knowingly, wilfully, and feloniously conspire to defraud the United States of lawful money then and there due and to become due to the United States as a portion of the lawful duty upon imported merchandise then and there imported and to be imported into the United States by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot from a foreign country, to wit, from France; and that the object of the said conspiracy was to be effected by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot by entering and introducing and attempting to enter and introduce into the commerce of the United States at less than its true cost and actual value the said imported merchandise, and that the entry of said merchandise was to be made at the port and collection district of New York, and was to be effected by means of fraudulent and false invoices, affidavits, and written statements and declarations to be presented by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot to the collector of customs at the said port of New York.

And to effect the object of the said conspiracy and pursuant thereto said Lawrence H. Mills, on the third day of December, in the year nineteen hundred and nine, subscribed and made a declaration of owner forming a part of and contained in a certain written entry of imported merchandise presented to the collector of customs at
14 the port of New York by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot under and by the name and style of Mills and Duflot. which said written entry referred to and

embraced one case of veilings theretofore imported from a foreign country, to wit, France, on the third day of December, in the year nineteen hundred and nine, in the steamship "Adriatic," and marked P ⟨R⟩ P 173, and was given the serial number 304243 by the said collector of customs.

And further to effect the object of the said conspiracy and pursuant thereto the said Charles G. Mourraille, on the eleventh day of December, in the year nineteen hundred and nine, subscribed and made a declaration of owner forming a part of and contained in a certain written entry of imported merchandise presented to the collector of customs at the port of New York by the said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot under and by the name and style of Mills and Duflot, which said written entry referred to and embraced among other things one case of silk veilings theretofore imported from a foreign country, to wit, France, on the tenth day of December, in the year nineteen hundred and nine, in the steamship "Majestic" and marked P ⟨R⟩ P 175, and which said written entry was given the serial number 311680 by the said collector of customs; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5440, U. S. R. S., and sec. 9, customs administrative act.)

HENRY A. WISE, *U. S. Attorney.*

15 (Endorsed:) U. S. Circuit Court.—The United States of America vs. Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, doing business as "Mills and Duflot."—Indictment.—Undervaluation of imported merchandise and conspiracy to defraud the United States.—U. S. Rev. St., sec. 5440, and sec. 9, customs administrative act as amended. Henry A. Wise, U. S. attorney.—A true bill. John E. Fairchild, foreman.—U. S. Circuit Court, Southern District N. Y. Filed Feb. 20, 1911. John A. Shields, clerk.

1911, Feb. 20. B. W. issued.

Feb. 20, defts. plead not guilty. Bail fixed in sum of $7,500 as to Mills, $7,500 as to Mourraille, and $12,000 as to Duflot.

16 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to fifteen, inclusive, contain a true and complete transcript of the warrant of arrest and indictment filed in said court in the cause entitled "In the matter of the application of Henry A. Wise, United States attorney, for a writ of habeas corpus," as the same remain of record and on file in my office, same having been omitted from the transcript of record filed on or about the 21st day of March, 1911.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 7th day of April, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the said United States the one hundred and thirty-fifth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsed:) 964. 22585. United States Supreme Court. In the matter of the application of Henry A. Wise, U. S. atty., for a writ of habeas corpus. Transcript of record from the Circuit Court of the United States for the Southern District of New York. Office of the clerk. Received Apr. 8, 1911. Supreme Court U. S.

(Indorsement on cover:) File No. 22585. Supreme Court U. S. October Term, 1910. Term No., 964. Henry A. Wise, individually and as U. S. attorney, etc., appellant, vs. William Henkel, U. S. marshal, etc. Stipulation of counsel and addition to record. Filed April 12, 1911.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

HENRY A. WISE, PLAINTIFF IN ERROR,
v.
LAWRENCE H. MILLS, CHARLES G. Mourraille, and Emil S. Duflot. } No. 963.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY A. WISE, INDIVIDUALLY AND AS United States attorney for the Southern District of New York, appellant,
v.
WILLIAM HENKEL, UNITED STATES marshal in and for the Southern District of New York. } No. 964.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The first of the above-entitled cases is a writ of error sued out to review an order of the Circuit Court for the Southern District of New York adjudg-

ing the plaintiff in error, who is United States attorney for the Southern District of New York, guilty of contempt of court for refusing to comply with an order to return forthwith certain books and papers taken into possession by the United States marshal at the time of making an arrest of certain persons charged with violations of the customs laws.

The second case is an appeal from an order discharging a writ of habeas corpus sued out by the United States attorney in the same matter. Following the order of the court directing the return of the books referred to, which order he refused to obey, he was cited before the Circuit Court for the Southern District of New York, Judge Lacombe sitting, to show cause why he should not be committed for contempt. After hearing, he was remanded to the custody of the marshal, and thereupon sued out a writ of habeas corpus in the Circuit Court for the Southern District of New York before Judge Holt. After hearing on the writ, the writ was discharged and this appeal taken.

The defendants in error are copartners and importers of silks, veilings, etc., doing business in the city of New York. On February 20, 1911, they were indicted in the Circuit Court for the Southern District of New York for conspiracy to defraud the United States, by means of a false and fraudulent invoice, of money due upon a case of merchandise imported from a foreign country. Subsequently a bench warrant was issued for their arrest and the marshal, with deputies and others to assist him, went to the

defendants' place of business, arrested them, and at the same time searched for, seized, and removed books and papers relating to their European importations, among others a double set of invoices by means of which the crime charged in the indictment, and other crimes of a like nature, were committed. Thereafter, upon petition of the defendants in error, District Attorney Wise was cited to show cause why he should not return the books and papers thus seized. District Attorney Wise, for answer to the order to show cause, showed that he had returned to the defendants in error all of the books and papers relating to their current business as well as such of the other books and papers as did not relate to the crime charged in the indictment, and other crimes of a like nature, and that he was ready and willing to return all of the books except those which were necessary as evidence in proving the offense charged in the indictment and similar offenses which were being investigated by the grand jury. He also showed that he had given the defendants in error access to the books and papers in his possession.

Judge Lacombe, before whom the order to show cause was heard, being of the opinion that the officers who were authorized to make the arrest had exceeded their authority in seizing the books and papers of the defendants in error, directed District Attorney Wise to return said books and papers. This he refused to do and was subsequently committed for contempt.

The cases therefore present the question whether the seizure by arresting officers of books and papers,

evidences of the commission of the crime on account of which the arrrest was made, or of other like crimes, is an unlawful search and seizure within the meaning of the Constitution and whether in these cases the officers in making the seizure as a matter of fact [exceeded their lawful authority. The further question is presented whether, even though the arresting officers had authority to seize the books and papers as evidence of the crime charged, they exceeded their authority in seizing other books and papers and their entire action thereby was rendered unlawful, or whether the United States attorney was justified in retaining those portions of the papers seized which had relation to the crime charged.

The cases are of unusual public importance; they affect not merely the administration of the criminal law in important cases pending against the defendants, both civil and criminal, but many other cases, not only cases arising under the customs laws, but other prosecutions in which seizures have been made. The principle, too, has application not only to prosecutions in the Southern District of New York, but elsewhere throughout the country.

For this reason the Solicitor General moves the court to advance the cases on the docket and set them down for hearing during the present term on a day convenient to the court.

FREDERICK W. LEHMANN,
Solicitor General.

March, 1911.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

HENRY A. WISE, PLAINTIFF IN ERROR,
v.
LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, and EMIL S. DUFLOT. } No. 963.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY A. WISE, INDIVIDUALLY AND AS United States Attorney for the Southern District of New York, Appellant,
v.
WILLIAM HENKEL, UNITED STATES Marshal in and for the Southern District of New York. } No. 964.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR AND APPELLANT.

STATEMENT.

These two cases in everything but form are the same. They both bring under review, No. 963 by writ of error, and No. 964 through the medium of

habeas corpus proceedings, an order of the Circuit Court of the United States for the Southern District of New York, adjudging Henry A. Wise, the United States Attorney for that district, guilty of contempt of the court and committing him to the custody of the marshal until he purged himself of that contempt.

The alleged contempt consisted in the refusal of the attorney to obey an order of the court directing him to return certain books and papers, which he had received from the United States Marshal, to Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, whose property they were.

The persons named were partners, trading under the firm name of Mills & Duflot, at No. 465 Broome Street, in the city of New York, as importers of laces, silks, veilings, and other dry goods.

THE COMPLAINT AGAINST MILLS ET AL.

On the 20th of February, 1911, complaint was filed against them before John A. Shields, United States Commissioner for the Southern District of New York, by John M. Williams, an inspector of customs, charging them with conspiring on October 1, 1909, to defraud the United States of money due and thereafter to become due to the United States as a portion of the customs duties upon certain merchandise subject to duty by law and imported from France, and that the object of the conspiracy was to be effected by presenting to the collector of customs at the port of New York fraudulent and false invoices, affidavits, statements, and declarations in connection with and

relating to the said imported merchandise which was to be thereafter entered into the commerce of the United States at the port of New York. It was further charged that, pursuant to this conspiracy, Lawrence H. Mills, on the 3d day of December, 1909, made a declaration forming part of a written entry of imported merchandise, presented to the collector at New York by Mills, Mourraille, and Duflot, under the name and style of Mills & Duflot, embracing one case of veilings, imported from France on the 3d of December, 1909, in the steamship *Adriatic*. (R., 4, 5, 8.)[1]

THE COMMISSIONER'S WARRANT.

The commissioner issued his warrant upon this complaint for the arrest of the three defendants named. The warrant described the offense charged substantially in the terms of the complaint.

Proper officers of the Government executed this warrant and arrested the defendants named therein at their place of business in Broome Street on the 20th day of February, 1911, and at the same time and place seized books and papers belonging to defendants, and in their possession at their place of business, as probably constituting or containing evidence of the crime with which they were charged.

THE INDICTMENT.

Later, on February 20, 1911, the defendants were indicted in three counts.

The first count was based on the undervaluation of an importation by the steamer *Adriatic* on Decem-

[1] Record references are to Case No. 963.

ber 3, 1909, being the same importation described in the complaint before the commissioner.

The second count was based on the undervaluation of an importation by the steamer *Majestic* on the 10th of December, 1909.

The third count charged a conspiracy entered into by the defendants on October 1, 1909, to commit frauds upon the customs revenue, to be effected by undervaluations of importations then and thereafter to be made, and as overt acts set out the undervaluations of the importations set out in the first and second counts.

The defendants were subsequently arrested on a bench warrant issued upon this indictment and gave bail for their appearance thereto.

PETITION FOR RETURN OF BOOKS AND PAPERS.

On the 23d day of February the defendants filed in the Circuit Court a petition for an order on the marshal and the district attorney to show cause why the books should not be immediately returned to them. (R., 3.)

The petition recited that the petitioners were partners, doing business as importers of laces, etc., in Broome Street, New York City; that on February 20, 1911, the marshal had unlawfully and without warrant or authority seized and carried away a large quantity of books and papers, the property of petitioners, at their premises in Broome Street; that the books and papers so seized "constitute substan-

tially all the books and papers with which they are and have been for several years doing business;" and that these books and papers have been placed at the disposal of the grand jury and district attorney for examination by them.

An order to show cause was issued as prayed, and on the 4th day of March, 1911, the district attorney filed his sworn

return to the order to show cause.

This recites the complaint before the commissioner, the issuance of the warrant thereon, the arrest of the defendants named therein, and that at the time of making the arrest the marshals "did duly and in manner and form authorized by law take into their custody and possession certain books and papers which were and are and do contain evidence of the commission of a crime against the United States by the said defendants, by reason of the commission of which crime said defendants were lawfully apprehended as aforesaid"; and that the books and papers seized were delivered to and were then in the custody of the district attorney. (R., 4, 5.)

The return further recites that complaint was made to the grand jury that the defendants were and for some time had been engaged in the persistent practice of defrauding the Government of a portion of its customs duties upon importations by them, the finding of the indictment, and the arrest of the defendants thereon, all on the 20th of February, 1911. (R., 5.)

That at the time of the arrest and down to the date of the return the grand jury were investigating the fraudulent practices of the defendants, and when the order to show cause was served the district attorney was about to present the books and papers to the grand jury as evidence of further offenses, as to which additional indictments could be found. (R., 6.)

That on February 23, 1911, the defendant Mills and his attorney, A. Leo Everett, made an examination of the books and papers and selected from them all that related to "the current transactions of the said defendants in their business," and others which did not relate to the charges of crime against the defendants then pending before the court and before the grand jury. (R., 6.)

That all of the books and papers retained by the district attorney relate to, and contain evidence of, the commission of offenses against the customs laws by the defendants and relate to, and will, in all reasonable probability, be necessary to the proof of the charges of crime now pending against the defendants. (R., 6.)

The crimes charged against the defendants, which were the basis of the complaint before the commissioner and of the indictment, and concerning which the grand jury are making further investigation, were committed and conspired to be committed by consular invoices which undervalued the articles imported, and private invoices which showed their true value; and these two sets of invoices "which constitute the very instruments of the crimes charged against the defend-

ants," are among the books and papers taken at the time of the arrest of the defendants and now in the custody of the district attorney. (R., 6, 7.)

The defendants may at all reasonable times have access to the books and papers, and the district attorney will not keep them longer than the needs of justice require. (R., 7.)

The district attorney believes the defendants to be guilty of the offenses charged against them in the indictment, and of other offenses of a like nature, and he has probable cause for so believing. He sets out in this connection copy of a letter which the defendant Duflot admits having written to the Paris agent of the firm on February 5, 1909.

THE LETTER TO THE PARIS AGENT.

The relevant portions of this letter are as follows (R., 10, 11):

* * * * *

> Consular invoices: You will either have to change your name or get somebody else to sign the invoices. You have undervalued in such a foolish way that the examiner informed us last week that if the invoices were not made more clearly and correctly he would refuse to pass upon the goods, and we would have to wait weeks for the cases. You do not seem to realize that this is a very serious question. You will remember that at one time when the writer left Martin he told you what had to be done, and called your attention to the fact that exaggeration never works here. Please

bear this in mind, and also that the percentage which I had given you is quite sufficient.

Furthermore, in the cases received this week you invoice the high-priced scarfs at full price, 25 frs., and others at 18 fr. you invoice at 7 fr. 50, or something like that. Now, in your estimation, is that not the most ridiculous thing that can be done?

No matter how little the examiner knows, he would certainly know that if one scarf is worth 25 frs., the other must be worth at least 15, if not 18, frs.

Really, if you do not give these consular invoices some of your personal attention, it is perfectly useless for us to go ahead, as for the sake of a few thousand francs we do not want to spoil our reputation and have a lot of difficulties with our other invoices. If it were not for the fact that the examiner is a friendly one, every yard of our goods would have been seized, we would have had to pay the duty just the same, and we would have had no goods either for the duty or the bills we have to pay in Paris.

* * * * *

THE ACTION OF THE CIRCUIT COURT.

The Circuit Court, upon the authority of *Boyd* v. *United States* (116 U. S., 616), held the seizure of the books and papers to be unreasonable and in violation of the Fourth Article of Amendments to the Constitution, and directed the return of all of them to the defendants. This on March 15, 1911.

DISTRICT ATTORNEY'S STATEMENT OF GROUNDS FOR REFUSING TO OBEY THE COURT'S ORDER.

In this statement the district attorney repeated with something more of detail what he had set out in his return to the order to show cause. (R., 15–18.)

He stated also that he had returned some books which did not bear upon the charges against the defendants, but all those now retained by him "are and contain competent and relevant evidence establishing the commission of the very crimes and offenses against the laws of the United States by said Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot, and each of them, for which the commissioner issued his warrant of arrest, and for which the said grand jury returned its indictment as aforesaid." These books and papers establish the details of the fraudulent practices adopted by the defendants in their scheme and conspiracy to defraud the United States. (R., 17.)

The books and papers taken at the time of the arrest did not constitute a general seizure of all the defendants' business records, and are in fact but a very small part of them, and a list of them is appended as Exhibit D. (R., 22, 23.) Only such were taken as "were believed reasonably to relate to the crime for which the arrest was made."

The statement concludes (R., 18):

> For the foregoing reasons and in view of the grave importance to the public interest of the question at issue, the United States attorney,

with due respect to the court, feels constrained to refuse to comply with said order of this court until a final determination on appeal of the question involved.

In this connection the defendant Mills files an affidavit, in which he states (R., 23, 24):

> * * * that inasmuch as there appears some contradiction between the original petition of deponent and said answer of Henry A. Wise as to the nature and number of the books used by defendants in their business, deponent states: That the business of defendants consists of importing merchandise in large quantities and from a few manufacturers and selling them in the United States to a very large number of jobbers and dry goods merchants; that the United States marshal, upon February 20th, 1911, in making the seizure referred to, did not seize the books and papers relating to the selling department of defendants' business, which constitutes in bulk the larger part of the books and records of the firm.
>
> It is still true, however, as stated in the original petition herein, that the marshal seized substantially all of the books and papers used in the business of importing silks and other dry goods.
>
> The business is conducted with Zurich, Switzerland; Lyons, and Paris, and Japan.
>
> The books and papers relating to the European importations were substantially all taken.

The indictment herein has to do exclusively with shipments from Paris, which constitute in value less than 10% of the total importations made by the defendants.

ORDER OF COMMITMENT.

The district attorney, persisting in his refusal to obey the court's order, was adjudged guilty of contempt and committed to the custody of the marshal until he should comply with the order or otherwise purge himself of the contempt.

Recognizing the importance of the case and the propriety of the district attorney's action in proposing a review of the decision, the Circuit Court made provision for securing the papers against loss pending appeal.

The district attorney sought release from the custody of the marshal by writ of *habeas corpus*, but upon the hearing of his petition the writ was discharged. From the order discharging the writ, he appeals. He also seeks a review, by writ of error, of the order of the court committing him for contempt.

PROPOSITION OF LAW AND AUTHORITIES.

In executing a warrant of arrest upon a charge of crime the officer may at the time and place of making the arrest seize anything upon the person of the defendant or in his possession at that time and place which is evidence of the crime for which he is arrested, and, this being so, the district attorney was entitled to the possession of books and papers containing evidence of the crimes charged against the defendants Mills, Mourraille, and Duflot, in the complaint under which they were arrested and which were taken from their possession at the time and place of their arrest; and his refusal to return them under the order of the court was a proper discharge of his duty as the prosecuting officer of the Government.

1 Bishop on Criminal Procedure, sec. 210.

Wharton Crim. Plead. and Practice, 8th ed., sec. 60.

Dillon v. *O'Brien and Davis*, 16 Cox Crim. Cas., 245.

Ex parte Hurn, 92 Ala., 102.

Getchell v. *Page*, 103 Me., 387.

Smith v. *Jerome*, 47 Misc. (N. Y.), 22.

State v. *Robbins*, 124 Ind., 308.

Reifsnyder v. *Lee*, 44 Iowa, 101.

Closson v. *Morrison*, 47 N. H., 482.

Spalding v. *Preston*, 21 Vt., 9.

United States v. *Wilson*, 163 F. R., 338.

ARGUMENT.

As to the facts of this case there is no conflict. There was a little confusion as to the extent of the seizure of books and papers. In his original petition

for their return Mr. Mills said they constituted "substantially all the books and papers" with which they had done business for years. (R., 3.)

The district attorney said "the books so taken and now detained constitute a very small part of the business records of said defendants." (R., 18.)

The subsequent affidavit of Mr. Mills reconciles this apparent contradiction: "The books and papers relating to the European importations were substantially all taken." (R., 23.)

The district attorney, not challenging the correctness of this last statement, states that all the books and papers kept by him are essential as evidence to prove the offenses charged in the complaint made before the commissioner and for which the indictment was found on the same day.

As to this Mr. Mills says only that "the indictment herein has to do exclusively with shipments from Paris, which constitute in value less than 10% of the total importations made by the defendants." (R., 24.)

How much of their total importations is from Japan he does not say, and no papers concerning Japanese importations appear to have been taken or withheld.

The papers taken and detained relate to importations from Paris, Lyons, and Zurich.

The offenses charged are conspiracy to cheat the Government by fraudulent undervaluations of imports and two cases of consummated frauds of such nature.

There was no finding by the Circuit Court that the books and papers were not relevant and material to

the support of the charges against the defendants made by the complaint. There is nothing to impair or qualify the statement of the district attorney that they are so relevant and material.

Charges of fraud admit of and require a large scope of proof. Other transactions of a like nature may be shown as illustrating the purpose or intent of acts which in themselves may not be fraudulent.

The order of the court and its opinion are plainly to the effect that regardless of the probative qualities of the books and papers, the seizure of them was not authorized by the warrant of arrest, and was unreasonable within the meaning of the Fourth Article of Amendment to the Constitution.

Boyd v. *United States* (116 U. S., 616) was thought by the court to be conclusive of the case, but we submit that the question here involved—the authority of an officer executing a warrant of arrest—was not determined in that case and was not under consideration.

The *Boyd* case was an information for the seizure and forfeiture of property imported under false invoices. It became important upon the trial to show the quantity and value of some goods previously imported. Section 5 of the act of June 22, 1874, authorized a motion by the United States Attorney in such cases for the production of any book, invoice, or paper, to be particularly described, which would tend to prove any allegation made by the United States, and empowered the court, in its discretion, to require the production of this book, invoice, or

paper, and if the defendant failed to comply or give a satisfactory explanation of his failure, the allegation in support of which the book, invoice, or paper was demanded was to be taken as confessed. At the trial, and pursuant to such a notice, Boyd produced the invoice called for by the United States Attorney, but objected to its reception as evidence on the ground that the compulsion under which it was secured involved unreasonable search and seizure, and self-incrimination as well.

The legitimate scope of laws authorizing search warrants was considered by the court, but the scope of authority of an officer making arrest, beyond the mere apprehension of the person to be arrested, was not considered.

That the authority of the officer is not strictly limited to taking into custody the person of the alleged offender is recognized by Judge Lacombe in this case. He says (R., 12):

> From time immemorial an officer making a lawful arrest on a criminal charge has taken into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence on the trial. A bloodstained knife or garment, a half-emptied phial of poison, a mask or disguise, counterfeit coins, plates for printing counterfeit notes, gambling devices, stolen property, and many other articles are thus seized every day on the person or the premises of the alleged criminal, and no one disputes the propriety of such seizure.

This holding finds abundant support in the text-books and the adjudicated cases.

Bishop on Criminal Procedure says (vol. 1, sec. 210):

> An officer, having made an arrest, is required to keep the prisoner safely until lawfully discharged; and * * * he may search his person to ascertain whether he has implements to aid his escape, and may take them away * * * In like manner, in cases of larceny, and others in which there is a probability of finding evidence of guilt on the prisoner's person, he may be searched for them. And the officer, on making the search, may take from the prisoner any articles of property which, it is presumable, may furnish evidence against him.

And section 211:

> The arresting officer should consider the nature of the accusation; then, if he finds on the prisoner's person, *or otherwise in his possession*, either goods or money *which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, or as supplying evidence relating to the transaction*, he may take them, and hold them to be disposed of as the court shall direct.

Wharton speaks to similar effect in Criminal Pleading and Practice (8th ed., sec. 60).

In some of the States there are statutes requiring search in cases of arrest; but as against constitutional provisions these can give no sanction which common-law usage does not confer.

The basis of this right of search and seizure was elaborately discussed in the English case of *Dillon* v. *O'Brien and Davis* (16 Cox Crim. Cases, 245), decided in 1887. This was an action of trespass on account of the alleged unlawful seizure of certain bank notes, coins, and papers. The defendants justified that as officers of the law they had arrested the plaintiff, under a warrant, for an indictable offense, and at the time of the arrest had taken from him and his house the bank notes, coins, and papers, all of which were material and necessary evidence in the prosecution. The court, speaking through Lord Chief Baron Palles, said (pp. 247–251):

> The gist of this defence appears to be, that the plaintiff was lawfully arrested for an indictable offence, of which it is averred he was actually guilty; that at the time of his arrest he was in possession of certain articles which were material and necessary evidence in the prosecution for such offence; and the question raised is, whether the defendants were legally justified in taking those articles from the plaintiff without violence, or anything which in law would amount to an assault, and in detaining them until the determination of the prosecution. The main portion of the argument for the plaintiff was, that even if such a right existed in reference to the taking of evidences of a felony, it did not apply to misdemeanours; but it was also (although not confidently) contended that there was no such right even in treason or felony. Before, therefore, I proceed to deal with the case of a mis-

demeanour, it is necessary to see how the law stands in reference to greater crimes (pp. 247, 248). * * *

I, therefore, think that it is clear, and beyond doubt, that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime; and I take the only real question upon this defence as being, whether this right extends to cases of misdemeanour. No case has been cited in which the right (in reference to misdemeanour) has been judicially decided to exist, and no text book draws the distinction here attempted to be drawn. The matter must, therefore, be determined on principle. For this purpose I must first ascertain the reason of the rule as applicable to felony. The characteristic (by which felony is distinguished from misdemeanour) is that at common law the goods of the felon were forfeited upon conviction. The only right, however, to these goods which the books mention as being in the Crown before conviction, by reason of the possible future conviction, is that of taking (and detaining them for a reasonable time) for the purpose of making an inventory. Such a right has nothing in common with that of taking for the purpose of evidence. Forfeiture in felony, therefore, cannot be the origin of the right. To what then is it to be referred? Its purpose and object, viz: to produce the goods in evidence

in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law (pp. 249, 250). * * * But the interest of the State in the person charged being brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture. If material evidences of crime are in the possession of a third party, production can be enforced by the Crown, by *subpoena duces tecum*. But no such writ can be effective in the case of the person charged. It appears to me to be clear that this must be the origin of the right in felony; and that, being derived from the common law, it ought, prima facie at least, to be deemed to exist in all cases in which that interest of the State exists, and cannot (at least without express authority) be so confined as to be inapplicable in cases of custodies of such value in the eyes of the law as to justify, for their preservation, the taking of life (p. 250). * * * This brings me to the only case relied on by the plaintiff: (*Entick* v. *Carrington*, 19 State Trials, 1029, 1063–4). The question there was as to the

legality of a warrant, not only to seize and apprehend the plaintiff and bring him before a Secretary of State, but also to seize his books and papers. In that case there was no allegation of the plaintiff's guilt, nor that there was reasonable or probable cause for believing him guilty, nor that a crime had, in fact, been committed by anyone, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or anyone else (p. 251). * * * It was, of course, decided that that warrant was illegal; but the case, as a decision, is not in point here. The right here claimed is not to take all the plaintiff's papers, but those only which are evidence of his guilt; and the claim is based, not as in *Entick* v. *Carrington* (19 State Trials, 1029), upon a warrant issued upon mere suspicion, but upon an allegation of actual guilt, and a lawful apprehension of the guilty person. If (by the law, as then understood) the right to seize evidences of guilt in the possession of the person charged was confined to cases of treason and felony, the judgment would have been rested on that simple ground, the care which was taken to show that the warrant embraced all papers would have been thrown away, and the whole of the elaborate judgment of Lord Camden would have been unnecessary. For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers (p. 251).

An American decision in which the question is extensively considered is *Ex parte Hurn* (92 Ala., 102). Hurn had been arrested on the charge of fraudulently obtaining goods on credit. At the time of his arrest he was searched by the officer, who found $1,124 concealed in his clothing, which he took into possession, as being related to the offense for which the prisoner was arrested. An application by Hurn for the restoration of this money, as having been taken from him by unreasonable search and seizure, was denied.

The court, concluding an elaborate opinion, said (p. 112):

> After a careful examination of the Constitution, prohibiting unreasonable searches and seizures, the common law, the statutes and authorities, *we hold, that it is the duty of an officer having no other authority than the right to make the arrest, to search the party arrested, and seize and remove from him* any dangerous weapon found on his person; and he may also seize any money or *anything connected with the offense, or which may be used as evidence against him on the prosecution, and retain the* money or the *thing, until turned over to the State's attorney,* or paid into the court to abide the result of the trial; that an officer acting in good faith, in the execution of this duty, and proceeding upon probable grounds for believing that the money or thing is connected with the offense charged, or may be used as evidence on the trial, may search and take from the defendant

> arrested by him on a criminal charge, money found on his person, and he will not be liable in damages for a trespass, although it may turn out that the money or thing was not in fact connected with the offense, or could not be used as evidence of the commission of of the offense.

The liquor law of Maine made specific provision for search and seizure in cases of arrest under it. In *Getchell* v. *Page* (103 Me., 387) an officer having seized property at the time and place of an arrest which was not specifically described in the warrant or the statute, was sued in trespass for this act. The officer justified his seizure as of effects to be used as evidence of the crime. The court said (pp. 390, 392):

> It is well settled that an officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by efficient prosecution of criminals require it. * * *
>
> The plaintiff claims that this statutory provision is both mandatory and exclusive, that it was intended to cover and does cover the whole ground, and that the right of an officer to take articles of personal property to be used as evidence is limited by statute to the various kinds of articles named therein. We are unable to agree with this interpretation. The statute certainly does not say so, and we

> do not think it was meant so. We think, on the contrary, that the statutory provisions referred to are in affirmation of the common law duty of officers, and are not exclusive. * * * We are persuaded that the purpose of the legislature in enacting the statute in question was to emphasize sharply the duties of officers in this respect, by express statutory command. And if this is so, it would be singular indeed, if the legislature at the same time intended to narrow the common law power of officers, and impliedly forbid them to take articles of evidence not expressly named in the statute.

The matter was considered by Judge Gaynor in *Smith* v. *Jerome* (47 Misc. (N. Y.), 22), and he said respecting it (pp. 23, 24):

> The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested. We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial. The authorities on this head seem to be few, but only because the thing has seldom if ever been questioned.

Other cases to like effect, cited to show how generally this doctrine is recognized, are *State* v. *Robbins* (124 Ind., 308), *Reifsnyder* v. *Lee* (44 Iowa, 101),

Closson v. *Morrison* (47 N. H., 482), *Spalding* v. *Preston* (21 Vt., 9), and *United States* v. *Wilson* (163 F. R., 338).

The seizure of books made in this case seems to us to be fully warranted under the law of arrest as declared by Judge Lacombe himself.

What was done here? Under a proper warrant a United States Marshal entered a business office and arrested the persons conducting the business upon charges of crime, and at the same time took books and papers which were in that office in the possession of the defendants and their property, and *which constitute evidence of the offenses charged against them.*

What was unreasonable in this? Not the invasion of the office, nor the arrest of the defendants, for this was done under a very specific warrant, issued upon very probable cause, designating the persons to be seized. The only thing unreasonable, then, must be the seizure of the incriminating books and papers.

The most usual search in case of arrest is of the person. Pockets are rifled and garments are ripped in the search, and protest is in vain if there is reasonable ground for believing that the prisoner may have concealed on his person anything in the way of instrument, result, or evidence of the crime with which he is charged. If the warrant for the seizure of the person authorizes also the search of the person and the seizure of what he may have in his hands, or pockets, or coat lining, it certainly must authorize a search of the prisoner's possession beyond his body,

and certainly to the extent of the immediate place of arrest. A desk, a closet, a box, a trunk in the room in which the arrest is made may be looked into quite as well as the man's pockets. The place can not be more sacred than the person.

The Constitution by the same provision and by the same words, and therefore in the same manner and measure, secures the people "in their persons, houses, papers, and effects," against unreasonable search and seizure. They all, person, house, papers, and effects, stand upon the same footing, and so the authorities do not discriminate between seizure of things from the person of the accused and seizure of things otherwise in his possession at the time and place of his arrest.

The seizure, then, was not unreasonable because of things in the office of defendants rather than upon their persons. So if there is anything unreasonable in the case it must be because of what was seized.

But there is no discrimination in the Constitution in favor of papers. The constitutional guaranty is expressed in the same terms as to "papers" and "effects." When the officer makes an arrest he has no authority to seize any "effects" in the possession of the accused save as he has reason to believe that they are instruments, results, or evidences of crime, or, beyond this, as they may be means of aiding the prisoner in any attempted escape.

Not simply stolen effects may be seized, but the prisoner's own effects, and these not simply when contraband of law, but when they are or may be evi-

dences of the offense for which the prisoner was arrested.

"Papers" may be the instruments, the fruits, or the evidences of crime, and so they may be seized without infraction of the Constitution under any circumstances which warrant the seizure of effects.

The Constitution of the United States is to be read in the light of the common law. (*United States* v. *Wong Kim Ark*, 169 U. S., 649.) And the provision against unreasonable search and seizure is to be construed consistently with the common law as to search and seizure in cases of arrest for crime.

In *Mattox* v. *United States* (156 U. S., 237; l. c., 243) the court said:

> We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.

The extent of the seizure can not impair its lawful quality, for this may mean only that the evidences of offense were many. And very probably there were here evidences of specific fraudulent importations other than those mentioned in the complaint or the indictment, for undervaluation to the limits of prudence was a fixed habit and method of business with the defendants. This is clear from the letter to the Paris agent, which reproaches him, not for his sin of undervaluation, but for the "foolish way" of its commission, and bids him bear in mind always "that the percentage I had given you is quite sufficient." Moderation, it seems, is a virtue, even in fraud, for excessive greed exposes itself. But while the percentage of undervaluation must not be too large, it must be generally applied, otherwise the disparity in the stated prices of different articles will attract attention and "spoil our reputation."

The formulation of this plan of fraud and the systematic execution of it would be competent evidence in any particular case of importation to show that an undervaluation was fraudulently made and at the instigation of the defendants. The whole series of duplicate invoices, the false consular invoices, and the correct private ones, would all be relevant and material evidence not only of the conspiracy to defraud the Government but of each act in consummation of that conspiracy; and the very mass of them would put the question of guilty knowledge and participation of the defendants in the acts of their agent, who made the false consular invoices, beyond the

pale of doubt. So all the papers relating to importations from Europe, and only such papers are detained by the district attorney, are reasonably necessary to prove the offense with which the defendants are charged, none the less so that they may also prove other offenses of a like nature.

Nor does it follow necessarily that if some of the papers withheld prove frauds on the customs not related to those charged in the complaint the seizure of them was unlawful.

Crime, as such, is accorded no immunity by the Constitution. The prohibition of compulsory self-incrimination was not extended as an indulgence to wrongdoing. And the prohibition is simply of the use of physical or moral compulsion to extort evidence from a man accused and not to hinder otherwise the establishment of his guilt. (*Holt* v. *United States*, 218 U. S., 245.) And so the Fourth Amendment was not designed to enable a man to conceal or destroy papers and effects which prove his guilt of offenses against the law, but only to secure the citizen in his person, home, papers, and effects against unreasonable search and seizure. For this purpose, and this alone, the requirement of a specific warrant is made. The warrant of arrest is specific. It designates the particular person to be seized. It can not, in addition, be specific as to place, for, if so, it would be utterly unavailing. It necessarily authorizes arrest of the person wherever he may be found within the jurisdiction, and if need be the invasion of his house or home for that purpose.

When the marshal went into the office of Mills & Duflot he went there lawfully; his entry was not a wrongful invasion; the rightful security of the defendants in their business home was not disturbed. When he seized them and the evidences of the crime for which he arrested them, then and there in their possession, it was a lawful seizure of persons and papers. But there were evidences of other offenses committed by them in the view and within the reach of the officer. In other words, there was more cause, or more causes, for the search and seizure than had been anticipated. To use the illustration employed in *Adams* v. *New York* (192 U. S., 585, l. c., 598), in an authorized search for stolen goods the officer came upon burglars' tools and seized them. The court said they might be used in evidence against the accused, and that the Fourth and Fifth Amendments were not intended to prevent such use, but "are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect."

The necessary implication of this argument, if not its direct assertion, is that the seizure of the burglars' tools was not wrongful and did not violate either of the amendments. The invasion of the house was not wrongful, and the search of it was not, and the finding of the tools was but an unexpected incident of a rightful search. And the Fifth Amendment was not vio-

lated because the accused was not himself compelled to produce the tools.

If a person finds papers or property he is under obligation, moral and legal, to return them to the owner, but not so if they are either the instruments or the evidence of crime. He has come upon them without invading any right of the owner. His duty as a citizen is to the Government, and so that duty is to turn them over to the representatives of public justice.

And so when the officers, being rightfully on the premises of the defendants, found there evidences of guilt, it was their duty to take them, none the less that this guilt tainted an entire side of the defendants' business and extended to every imporation they had ever made. If this meant, as the court said in its opinion, before the precise extent of the seizure had been made plain, "a general seizure of all the defendants' business records," the fault was theirs that their business was so tainted. Crime ordinarily is an occasional act, but it remains crime even though it becomes methodized and systematized as the regular habit and use of business. The occasional criminal caught by a search warrant in two crimes when he was suspected of but one is not protected by the Constitution against this result, and the offender of regular habit is no more protected against the more numerous catch which results from a warrant against him.

In any event, the order for return was too broad. There is no question upon this record that among

the papers held by the district attorney there were some which were evidences of the specific crimes charged in the complaint and for which the defendants were arrested. The case of *Getchell* v. *Page* (103 Me., 387) is squarely in point as to this, the officers being held liable there only for such articles seized by them as could not be used in evidence. This accords with the reason of the matter, for an officer in searching his prisoner can not know certainly what is and what is not contraband, and acting reasonably in that behalf his conduct is to be justified, and every right of the prisoner is conserved if anything which was improperly taken from him is returned upon discovery of the fact.

It is respectfully submitted that the order of the Circuit Court in each of these cases should be reversed.

F. W. LEHMANN,
Solicitor General.

APRIL, 1911.

○

Nos. 963, 964.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

Office Supreme Court, U. S.
FILED.
APR 22 1911
JAMES H. McKENNEY,
CLERK.

HENRY A. WISE, PLAINTIFF IN ERROR,

v.

LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, AND EMIL S. DUFLOT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY A. WISE, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, APPELLANT,

v.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR AND APPELLEE.

A. LEO EVERETT,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

HENRY A. WISE, PLAINTIFF IN ERROR,
v.
LAWRENCE H. MILLS, CHARLES G. MOURRAILLE, AND EMIL S. DUFLOT. } No. 963.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY A. WISE, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK. } No. 964.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR AND APPELLEE.

Statement of Facts.

(The references are to the record in No. 963.)

The defendants in error are copartners doing businesss at 465 Broome St., in the Borough of Manhattan, City of New York and Southern District of New York, as im-

porters of laces, silks, veilings and other drygoods, and have been so employed for four years. (Petition, fol. 7.)

On the 20th day of February, 1911, upon the complaint of John M. Williams, Inspector of Customs, charging the defendants in error with the crime of conspiracy to defraud the United States of lawful money due for customs duties on a certain importation, a warrant was issued by J. A. Shields, Commissioner, for the arrest of the three defendants in error. (Affidavit of H. A. Wise, fols. 10–11.)

The complaint in question referred to the single importation of one case of veilings on the steamship "Adriatic" December 3, 1909, in reference to which the defendants in error are alleged to have made a false entry. (Complaint of John M. Williams, fol. 18.)

On the same day the Federal Grand Jury found an indictment against the defendants in error, alleging false entries in respect to two importations, viz.: on December 3, 1909, per steamship "Adriatic," being the same as that referred to in the complaint of John M. Williams, and on December 10th, 1909, per steamship "Majestic."

The losses on duties alleged to have been caused by these two entries are, in the first instance $10.20, and in the second instance $25.80; total, $36. (Addendum, fols. 10–12.)

The arrest was not made pursuant to the indictments, but upon the Commissioner's warrant already referred to. (Affidavit of Henry A. Wise, fol. 11.)

The warrant was delivered to the United States Marshal for the Southern District of New York, who deputized one Edward J. Brennan to execute the warrant. (Affidavit of Henry A. Wise, fol. 11.)

On the same day

> "Edward J. Brennan, together with certain other agents and employees of the Department of Justice, and together with the said John M. Williams, Inspector of Customs as aforesaid, duly proceeded to the premises known as No. 465 Broome Street, in the City of New York, and thereafter under and by virtue of the authority of the said warrant of arrest, duly and in accordance with law placed the said Lawrence H. Mills, Charles G. Mourraille and Emile S. Duflot, the above named defendants, under arrest, and duly conveyed them to the United States Court and Post Office Building. That at the time of making the said arrest the said Edward J. Brennan and the said other agents and employees of the United estates did duly and in manner and form authorized by law take into their custody and possession certain books and papers etc."

(Affidavit of Henry A. Wise, fol. 11.)

The books and papers referred to constituted substantially all of the books and papers with which the defendants in error had for several years been doing business as importers. (Petition, fol. 8; affidavit of Lawrence H. Mills, fol. 49.)

The complaint of John M. Williams, and the indictment, had to do exclusively with shipments from Paris. (Affidavit of Lawrence H. Mills, fol. 49.)

Paris importations constitute less than ten per cent. (10%) of the total importations made by them in the course of their business, which business is conducted with Zurich, Lyons, Paris and Japan. (Same.)

Practically the only books and records not seized by these men were those pertaining to the selling department of the defendants' business. (Same.)

After sundry books had been returned to the defendants as relating to their current business, and not required by the District Attorney, or otherwise useless to him, there were retained twenty-nine (29) books or bundles of papers. (Exhibit D of affidavit of Henry A. Wise, fols. 46–47.)

An inspection of the list will show how comprehensive was the seizure. On the face of it, it shows that not alone the entry mentioned in the complaint of Williams or those in the indictment, were covered by these books, but their entire foreign business besides.

At the time of making the seizure the agents of the Department of Justice did not know which of the books contained evidence relevant to the charge in the complaint.

> "Only such of their books and papers were taken at the time of the arrest as were believed reasonably to relate to the crime for which the arrest was made."
>
> (Affidavit of Henry A. Wise, fol. 37.)

> "That the said books and papers will be diligently and expeditiously investigated and examined by this deponent, and in the event that any other part thereof seems to this deponent not to relate to the said charges against the said defendants or not to be necessary to the proof thereof, this deponent will voluntarily surrender and return the same to the said defendants."
>
> (Affidavit of Henry A. Wise, fol. 14.)

The true purpose of the search and seizure is evident, viz. to procure information on which to base other indictments.

> "At the time of the service of the order to show cause herein deponent was about to present to the grand jury the books and papers as evidence of further offences" (fol. 13).

On February 23rd, 1911, defendants obtained an order to show cause, signed by Judge Holt, returnable February 24th, 1911, why the District Attorney and the Marshal should not surrender all of the books and papers taken by them. (Order to show cause, fol. 6).

The motion was, after adjournment, argued before Judge Lacombe, who held that the seizure, under the circumstances above stated, was in violation of the Fourth Amendment of the United States Constitution prohibiting unreasonable searches and seizures (fols. 24–28). His decision is the basis of the present appeal and writ of error.

POINTS.

I.

The jurisdiction of this Court.

II.

The history of the fourth amendment.

III.

Under the fourth amendment an arresting officer has no power, either with or without a search warrant, to search for or seize the books and papers of the accused.

IV.

While an arresting officer may, without warrant, seize stolen articles, or articles used as instruments of crime, when they are found upon the person of the accused, or are in plain view of the officer, it is an abuse of this right to search generally for evidence to be used against the accused.

V.

There is no unwritten usage justifying the search for and seizure of books and papers by an arresting officer.

VI.

The Court below had jurisdiction to order the surrender of the books and papers in question.

I.

The jurisdiction of this Court.

The Supreme Court has no jurisdiction to review the proceedings below by means of an appeal from the order discharging the writ of habeas corpus.

An appeal to the Supreme Court from a decision of the Circuit Court on habeas corpus may, it seems, be brought only pursuant to the provisions of Sections 763 *et seq.* of the Revised Statutes, which were limited but not repealed by the Act of March 3, 1891.

Craemer v. *The State* (168 U. S. 124).
Rice v. *Ames* (180 U. S. 371).
Fisher v. *Baker* (203 U. S. 174).

(See notes to U. S. Compiled Statutes, § 764, Ed. West Publishing Co., 1902.)

Section 763 of the Revised Statutes provides for such an appeal "in the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States." The District Attorney here is not restrained of his liberty *in violation of* the Constitution. While the Constitution provides immunity from unreasonable searches and seizures, it does not grant any right to officers of the law to make reasonable searches and seizures. It seems clear that such a right could be limited or controlled by law-making bodies, or even judges, without infringing on a district attorney's or police officer's constitutional rights.

There is no reason to suppose that the Act of March 10, 1908, chapter 76, gave the party aggrieved any greater rights by reason of the allowing of the certificate by a

Judge of the Circuit Court. The Act is entitled "An Act Restricting in Certain Cases the Right of Appeal to the Supreme Court in Habeas Corpus Proceedings."

Tnis Court has no jurisdiction upon *habeas corpus*, for another reason, viz.: "Upon *habeas corpus* the Court examines only the power and authority of the Court to act, not the correctness of its conclusions."

Harlan v. *McGourin*, 218 U. S. p. 448.

The other question is whether the proceedings below can be reviewed in this Court by writ of error. This writ is based upon the order adjudging the District Attorney in contempt for disobedience to the order requiring him to surrender the books and papers. The original order was not a final order within the meaning of the decisions of this Court. The requisite finality was obtained by the order adjudging him in contempt.

Nelson vs. *U. S.*, 201 U. S. 92;
Alexander vs. *U. S.*, 201 U. S. 117.

It does not follow, because finality can be obtained in this way, that every decision involving a constitutional question can thus be reviewed.

In the cases cited the contention of the plaintiff in error was that the court below had no jurisdiction to issue the order requiring the production of books. If his contention had been sound that vice would have inhered also in the order adjudging him in contempt for their non-production. That gave the Supreme Court jurisdiction to determine the question. In this case, however, the Circuit Judge had complete jurisdiction over his own process and over the District Attorney as an officer of

his court. He had jurisdiction to compel obedience to his first order even though that may have been improvidently issued or issued upon an erroneous theory of constitutional interpretation. The vice, therefore, if any, in his original order would not inhere in the order adjudging the District Attorney in contempt. It is the latter order, only, which is here for review.

II.

History of the Fourth Amendment.

The amendment is as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, and supported by Oath, or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

It was proposed to the Legislature of the several States by the First Congress on September 25th, 1789, and subsequently ratified by them. In the form in which the amendment had been recommended by the Committee of Congress, to which it was referred, it read as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, shall not be violated by warrants issuing, without probable cause, supported by Oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized."
>
> (Documentary History of the Constitution, Vol. 5, p. 138; Thorpe Constitutional History, Vol. 2, p. 226.)

On the floor of Congress, Elbridge Gerry proposed the changes in the phraseology which were subsequently adopted.

Thorpe, Constitutional History, Vol. 2, p. 245.
Annals of Congress, Vol. I, p. 783.

This provision was not new to most of the members of Congress; similar provisions having already been incorporated into the Bills of Rights of various States. Massachusetts had had a substantially similar provision since 1780.

All the authorities are agreed that the adoption of this clause was occasioned by the abuses of warrants in England and of writs of assistance in the Colonies. (See *Boyd* v. *United States*, 116 U. S., 616.)

The illegality of general warrants was established by Lord Camden's judgment in *Entick* v. *Carrington*, 19 Howell, St. Tr. 1029.

In the American Colonies seizures, under writs of assistance, were resisted by the colonists.

Paxton's Case, Quincy's Repts. p. 51 and Appendix p. 395.

The resistance was effective only in Connecticut:

> "The Collector of the Port of New London, in Connecticut, has lately applied a second time to the superiour court there for such writs; at the same time laying a letter before them which he had received from one of the crown lawyers in England in answer to one wrote upon the subject, in which letter a great compliment was paid to the chief justice of Massachusetts, for the proof he had given of a right understanding of the law, and of his zeal for his Majesty's service, by so readily granting those writs, upon the

application made by the custom house officers; and his example was recommended as worthy of imitation. The court did not, however, think proper to show a like complaisance, but chose to refer this request to the consideration of their general assembly at the approaching session."

(Boston Evening Post, January 29th, 1769, quoted in Appendix to Quincy's Reports, p. 503.)

The principle was not a new one at the time of the decision of *Entick* v. *Carrington*, (1765). Lord Camden showed, in that case, that the law had never recognized a general right of search and seizure and that there was no machinery by which it could be carried out.

"I wish some case had been shown where the law forceth evidence out of the owners' custody by process."

Entick v. *Carrington* (*supra*).

In Hale's Pleas of the Crown, which antedates *Entick* v. *Carrington* by a century, it is said:

"But the general warrant to search all places whereof the party and officers have suspicion, though it be usual, yet it is not so safe, upon the reasoning of Justice Swallow's case, above cited, and yet see precedents of such general warrants."

Hale's P. C. 1st Amer. Ed., 1847, Vol. 2, pp. 113, 114.

Justice Bradley has been unjustly criticised for his statement in *Boyd* v. *U. S.* (p. 633), that the constitutional provision against unreasonable searches and seizures is intimately connected with the immunity against self-incrimination.

Professor Wigmore is the leading critic.

> "The 'intimate relation between them,' which the opinion predicates, must be wholly denied. In the first place, the two doctrines had had a totally different political and legal history."
>
> Wigmore on Evidence, Vol. 4, Sec. 2264, p. 3126.

Justice Bradley did not originate this association of the two privileges. It had already been declared by Lord Camden in *Entick* v. *Carrington:*

> "But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed *upon the same principle.* Then, too, the innocent would be confounded with the guilty."
>
> (Quoted in *Boyd* v. *U. S.*, p. 629).

Professor Wigmore sums up his argument as follows:

> "In short the principles of the Fourth and Fifth Amendments are complementary to each other; what the one covers, the other leaves untouched" (Section 2264).

If both provisions had been in the first instance devised by the framers of the Constitutional Amendments, no doubt this would be true. Since, however, the two provisions had a long and diversified history, it might easily

happen that one would here and there overlap the other, and that the same invasion of liberty might give a right to redress under both provisions.

Professor Wigmore has undertaken to prove that they have their origin at a time not earlier than the 17th century.

Wigmore, § 2250, *et seq.*

The privilege against self-incrimination is of great antiquity, going back to the Roman law.

Hallam grasped the truth of the matter, and showed that the compulsory taking of defendant's testimony was an importation of the civilian lawyers accompanying the despotism of the 16th and 17th Centuries, which came like a wave from the Continent of Europe.

> "It would be invidious to exclude from the motives that altered Lord Coke's behaviour in matters of prerogative, his real affection for the laws of the land, which novel systems, broached by the churchmen and civilians, threatened to subvert.
>
> Hallam's Constitutional History, Vol. I, p. 335. (Murray 1881.)

> "An ecclesiastical chancellor devised the writ of subpœna compelling him (the defendant) to answer upon oath as to his trust. * * * This extension of a novel jurisdiction was partly owing to a fundamental principle of our common law, that a defendant cannot be examined." (Hallam, Vol. I, p. 345.)

He shows how the practice was introduced into the Star Chamber.

> "But the more regular course was by information filed at the suit of the Attorney General, or in certain cases of a private relator. The party was brought

before the court by writ of subpœna, and having given bond with sureties not to depart without leave, was to put in his answer upon oath, as well to the matters contained in the information, as to special interrogatories. (Hallam, Vol. II, p. 33.)

Professor Wigmore seems to have overlooked the conclusions of Pollock & Maitland:

"Innocent III introduced a new procedure, the inquisition. The judge proceeds *ex officio* either of his own mere motion, or on the suggestion of a promoter; he collects testimony against the suspect, testimony which the suspect does not hear; it is put in writing. But even this weapon was too feeble for that warfare against heresy in which the church was by this time engaged. The work of suppressing this crime was committed to the friars, more especially to the Dominicans, and the procedure by way of inquisition soon assumed in their hands all its worst characteristics. Every safeguard of innocence was abolished or disregarded; torture was freely used. Everything seems to be done that can possibly be done to secure a conviction. This procedure, inquisitory and secret, gradually forced its way into the temporal courts; we may almost say that the common law of Western Europe adopted it. When in the eighteenth century French philosophers and jurists rebelled against it and looked about them for an accusatory, contradictory, public procedure, a procedure which knew no torture, they looked to ancient Rome and modern England. Fortunate in her unblemished orthodoxy, England at the critical moment had escaped the taint of the *inquisitio hæreticæ pravitatis!*"

Pollock & Maitland History of English Law, 2nd Ed., Vol. II, pp. 657, 658.

"The canonists were evolving a law, and a rigorous law, of evidence. 'Full proof' consists of the accordant testimony of two unexceptionable witnesses who have themselves seen the crime committed. At all events in the case of serious crimes, full proof, proof clearer than the noonday sun, is requisite. Such proof was rarely to be had, more especially as large classes of mankind were incapable of testifying. One must eke out a 'half proof' by the confession of the accused, and to obtain this torture is used. Luckly for England neither the stringent rules of legal proof nor the cruel and stupid subterfuge became endemic here" (p. 659, 660).

"We have found upon the rolls a good many recorded confessions of crime, and it may have been considered the justice's duty to urge the accused to tell the truth; but when a prisoner had acknowledged his guilt before a coroner, and afterwards protested that his self-accusation was won from him by duress, we may see the justices sending for his gaoler and some of his fellow prisoners and taking their evidence as to the alleged extortion.

"Probably no fixed principle prevented the justices from questioning the accused; but there are no signs of their having done this habitually" (pp. 653, 654).

Professor Wigmore treats the Act of I and II P. & Mar., Chapter 13, Section 4, which gave to Justices of the Peace and Coroners power to take examinations of a party accused as being an instance of compulsory self-incrimination (Wigmore, p. 3084); but this is not the way in which it has generally been viewed.

"As to the examination of the prisoner, it must be testified, that he did it freely without any menace, or undue terror imposed upon him."

Hale's Pleas of the Crown, 1st Am. Ed., 1847, Vol. 2, p. 284.

The self-incrimination clause must be understood in order to understand the Fourth Amendment. The history of the immunity against search and seizure is more recent than the other, for the reason that books and papers have only recently been important in the proof of crimes. Practically all crimes except those relating to treason, were, before the seventeenth century, crimes of violence. There were no commercial crimes. In matters of treason, the English kings were so despotic that there seem to have been but feeble obstacles to their seizure of all the accused's property, including his papers. In the late seventeenth century treason more often took the form of seditious libel. It is therefore in connection with seditious libel that we first see the rule applied.

The probability is that the right of immunity from search and seizure was loosely conceived by the judges and lawyers of the eighteenth century as connected both with the immunity from self-incrimination and with the sanctity investing a man's house, expressed in the phrase "The house of everyone is to him as his castle" (*Semayne's* Case, 5 Co. Rep., p. 91; Smith's L. C. [11th Eng. ed., 1903], Vol. I., p. 104).

"The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen." Cooley, Const. Lim., 7th Ed., pp. 425, 426.

It partakes of the nature of each of these rights. What would shock an Englishman's sense of justice would be both the invasion of the privacy of his premises, and the use of his records to furnish testimony against himself (cf. the words of Lord Camden quoted, *supra*).

But it is an anachronism to speak of these immunities in early times as legal rights. The theory of rights is a modern one. The ancient common lawyers dealt with *rights of action* or *remedies*. A right existed merely in the absence of legal machinery by which it could be assailed. (Even *constitutional* rights were until the Seventeenth century merely *libertates* or *privilegia*.) If we look, therefore, for an assertion of these rights in the early centuries of the common law, we shall not find it. If we adopt the sounder method, that is, to try to find some writ, warrant, process or procedure by which such testimony could be obtained, we shall discover that there was no such machinery. So that, using the modern phraseology we would say that the right of immunity from search and seizure, as well as the right of immunity from self-incrimination, was coeval with the common law. We would also say that these two rights were intimately connected. They are connected not only historically, but logically, because the neglect of Englishmen to provide machinery to obtain such evidence was dictated by the same considerations.

It has remained for the modern commentators to evolve an ordered system in which each of these immunities has been given a place complementary to, and not infringing on, the other. The common law rights do not dovetail in this way, and much mischief may be done by attempting to warp them into harmonious classification.

III.

Under the fourth amendment an arresting officer has no power, either with or without a search warrant, to search for or seize the books and papers of the accused.

It is a significant fact that, though hundreds of thousands of arrests take place every year in English-speaking countries, not more than a half a dozen precedents can be found in a century and a half applying to the seizure of books and papers by an arresting officer. A number of cases are here cited, some directly in point, others merely illustrative.

Entick v. *Carrington*, 19 Howell St. Tr. 1029.
Dillon v. *O'Brien*, 16 Cox, C. C. 245.
State v. *Slamon*, 73 Vt. 212.
People v. *Adams*, 176 N. Y. 359, s. c. 192, U. S. 585.
Smith v. *Jerome*, 47 Misc. 22.
Houghton v. *Bachman*, 47 Barb. 388.
U. S. v. *Wilson*, 163 Fed. 338.
R. v. *Luce*, 6 Hawaii, 684.
Ex parte *Jackson*, 96 U. S. 727.
State v. *Griswold*, 67 Conn. 290.
Commonwealth v. *Dana*, 43 Mass. 329.
Blum v. *The State*, 94 Md. 375.

In the consideration of these cases, it is most important to bear in mind how they came up before the court.

There are three ways in which the right of search and seizure by officers of the law has been tested:

(1) By a civil action against the officer of the law for trespass;

(2) By motion to compel the redelivery of property *in custodia legis;*

(3) By appeal from the judgment of conviction based on the use in evidence of the illegally seized papers.

Of these only (1) and (2) are appropriate for the purpose. It has been held in *People* v. *Adams*, *State* v. *Griswold*, *Commonwealth* v. *Dana* (*supra*), and many other cases, that although books and papers may have been illegally seized by officers, that is no ground for their exclusion as testimony at the trial. Some of the cases therefore, e. g. *State* v. *Slamon* (*supra*), *Blum* v. *The State* (*supra*), where reversals were granted for the admission of testimony so obtained, are not to be regarded as authoritative.

Of the cases cited only *Entick* v. *Carrington*. *Dillon* v. *O'Brien*, *Smith* v. *Jerome*, *Houghton* v. *Bachman*, *R.* v. *Luce* and *U. S.* v. *Wilson*, brought up the question of the search and seizure of papers in such a way that the legality of the proceeding could properly be tried. In the *Jerome* case (*supra*) plaintiff had applied for a mandatory injunction against the District Attorney, to re-deliver certain letters which had been seized in his room at the time of his arrest by the police of Cincinnati on an extradition warrant. Judge Gaynor refused the injunction. His decision was correct, because he had no jurisdiction over the Cincinnati police, who were, as to the New York court, stran-

gers in the procuring of the testimony. Moreover, the Constitution of New York furnishes no immunity against unreasonable searches and seizures. The Judge's grounds for his decision are, however, open to criticism. He said:

> "We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial. The authorities on this head seem to be few, but only because the thing has seldom if ever been questioned. We have at least one such authority in this State (Houghton *v.* Bachman, 47 Barb. 388) and there are several in England."

Houghton v. *Bachman*, quoted by him, which is undoubtedly law, contradicts the principle stated by Judge Gaynor, as the following extract shows:

> "On the first of these questions, I suppose there can be no doubt of the authority and duty of an officer charged with the execution of a warrant for grand larceny, not only to arrest the accused, but to take into his custody the property described in his warrant, if he finds it on the person, or in the possession of the accused. *He has no power under such process to search the house or premises of the accused for concealed property.* For this purpose another process is necessary; but he may search the person of the alleged thief, or take into custody the property, if in his possession, and pointed out to him as that described in the process. The ends of justice demand that this power should exist, and the common law and its usages have sanctioned its exercise from time immemorial." (p. 392). (Italics ours.)

R. vs. *Luce*, 6 Hawaii 684. A search warrant was issued upon a complaint for conspiracy to defraud the Hawaiian

Government of customs duties. A statute authorized a search for "articles necessary to be produced as evidence or otherwise on the trial of anyone accused of a criminal offense." It was held that it could not be used to search for and seize the account books of the accused.

> "But in this case before me the books of account as 'articles'—that is as material objects or chattels—are not evidence to be used. They are desired by the prosecution for the records they contain, that is, for the entries of certain transactions, which will have to be testified to and read in order to be evidence. These transactions, if they have occurred, could be testified to by witnesses to the transactions even if not recorded. The books of account are merely succinct registers of the transactions themselves. In this view, I am of opinion that the search warrant was improvidently issued."

The Judge, however (it seems erroneously), ruled that the objection ought to be raised upon the offer of the books at the trial.

The case of *U. S.* v. *Wilson*, *supra*, will be noticed in a later point.

Entick vs. *Carrington*, 19 How St. Trial, 1029.

Declaration in Trespass. The declaration alleged that defendant

> "Broke open the boxes, chests, drawers, &c., of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, etc., in his dwelling house, and all the boxes, &c., so broke open, and read over, pried into and examined all the private papers, books, &c., of the plaintiff there found, whereby the secret affairs, etc., of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed

pamphlets, &c., of the plaintiff there found and other 100 charts, &c., took and carried away, to the damage of the plaintiff £2,000" (p. 1030).

Plea:

"* * * and the defendants did then and there find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, etc. there, in order to find and seize his books and papers, and to bring them along with the plaintiff before the said earl (Lord Halifax), according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration, and on the same day did carry the said books and papers to a house at Westminster, where the said earl then and long before transacted the business of his office," &c. (p. 1031).

The jury found in its special verdict (*inter alia*) that the warrant was issued for the seizure and apprehending of Entick together with his books and papers, upon information tending to show that he was concerned in publishing seditious libels.

The case was tried by Lord Camden and application was made before him for judgment on the verdict. In the course of the argument counsel for defendants said:

"Supposing the practice of granting warrants to search for libels against the state be admitted to be an evil in particular cases, yet to let such libellers escape, who endeavor to raise rebellion, is a greater evil, and may be compared to the reason of Mr. Justice Foster in the Case of Pressing (Vol. 18, p. 1323) where he says 'That war is a great evil but it is chosen to avoid a greater. The practise of pressing

is one of the mischiefs war brings with it; but it is a maxim in law and good policy too, that all private mischiefs must be borne with patience, for preventing a national calamity' " (p. 1040.)

In the course of his judgment Lord Camden said:

"Nor is there pretence to say, that the word 'papers' here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay, I am able to affirm, that it has been upon a late occasion executed in its utmost latitude: for in the case of Wilkes against Wood, when the messengers hesitated about taking all the manuscripts, and sent to the secretary of state for more express orders for that purpose, the answer was 'that all must be taken, manuscripts and all' accordingly, all was taken, and Mr. Wilkes' private pocket-book filled up the mouth of the sack" (p. 1065).

After describing the power claimed by the Secretary of State for issuing general search warrants, and the manner in which they were executed, Lord Camden says:

"Such is the power, and, therefore, one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books. If it is not to be found there, it is not law.

"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all of this description; wherein every man

by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books; and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to shew the law by which this seizure is warranted. If that cannot be done, it is a trespass.

"Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the

known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

"The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with. No less a person than my Lord Coke denied its legality, 4 Inst. 176; and, therefore if the two cases resembled each other more than they do, we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to shew them to the officer, who must see that they answer the description." * * * (pp. 1065, 1066, 1067).

"On the contrary, in the case before us nothing is described, nor distinguished; no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove in the owner's behalf the officer's misbehavior. To say the truth, he cannot easily misbehave, unless he pilfers; for he cannot take more than all.

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject, by adding proper checks;

would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy: my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing" (p. 1067).

"To search, seize and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible."

"But still it is insisted, that there has been a general submission, and no action brought to try the right. I answer there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law, which a few criminal booksellers have been afraid to dispute." (p. 1068).

"Lastly it is urged as an argument of utility that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn where the law forceth evidence out of the owners' custody by process. There is no process against papers in civil causes. * * * In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper search in these cases to help forward the conviction" (p. 1073).

"* * * It is very certain that the law obligeth no man to accuse himself; because the necessary

means of compelling self-accusation falling upon the innocent as well as the guilty, would be both cruel and unjust, and it should seem that search for evidence is disallowed upon the same principle" (p. 1073).

Dillon vs. *O'Brien*, 16 Cox C.C., 245. This was an action for trespass for seizing plaintiff's money and papers. The defendants were officers of the law, having a warrant for the arrest of the plaintiff.

"The defence then alleges that the defendants, in execution of this warrant, entered the house and room (the outer door of the house being then open) to arrest the plaintiff; that the plaintiff was then in the room with others of the parties to the conspiracy, and was in furtherance of, and as part of that conspiracy, engaged in receiving rents from certain tenants, and had books and papers in which they were making entries of the receipt of those rents, and also a certain telegram, all of which were being used for the purpose of such combination and conspiracy" (per Palles, C. B.)

It was the seizure of these papers and telegram that constituted the plaintiff's grievance. It was held by the Irish Exchequer Division, on appeal, that a cause of action did not lie. The Court said, *inter alia:*

"Before, therefore, I proceed to deal with the case of a misdemeanor, it is necessary to see how the law stands in reference to greater crimes. In doing this, I desire to confine myself to the exact question, which I think arises—that is, to a case in which the allegation is not that there was a reasonable suspicion of the plaintiff's guilt, but that he was actually guilty; that he was arrested whilst in the actual commission of the crime, that the articles taken were being at the

time used in the commission of the crime; and in which their materiality as evidence is also stated as a fact, and not upon suspicion." (*The important part of this passage is omitted in the Government's brief* [p. 18]).

Of course, the two cases above stated are not in conflict. There is a conspicuous difference between the seizure of the actual instruments of crime, in sight and being used by the accused, and the search for evidence of crime as an act quite independent of the arrest of the person. There cannot be any hesitation in deciding which of the two cases furnishes a precedent for us. *Entick* vs. *Carrington* has every essential element of similarity. The portions quoted from the pleadings and special verdict show that exactly the same course was pursued there by the officers executing the warrant of arrest. The only feature lacking here is that the warrant of arrest does not include a direction to search for and seize papers; but if such a search and seizure are not justified with a warrant *a fortiori* they are illegal without one.

Entick v. *Carrington* is still recognized in England as the leading authority on the subject.

Jones v. *German*, 1896, 2 Q. B. 418.

Boyd v. *United States*, 116 U. S. 616. Some observations have already been made tending to sustain Justice Bradley's view of the intimate relation between the fourth and fifth amendments. There remains to be noticed a criticism, made by later judges and text-book writers, (e. g. *People ex rel. Ferguson* vs. *Reardon*, 197 N. Y. 236, p. 246; Wigmore, § 2264), that *Boyd* vs. *the U. S.* was not a case of search and seizure,

and that, even if it had been, this would not have been a ground for reversing the judgment of conviction, which was based on the reception of the evidence so obtained.

Doubtless, the last part of the criticism would be justified if it had been an ordinary case of unauthorized search and seizure, not made pursuant to any statute; but it was not a case of that kind. The facts were that:

> "On the trial of the cause it became important to show the quantity and value of the glass contained in twenty-nine cases previously imported. To do this the district attorney offered in evidence an order made by the District Judge under § 5 of the same act of June 22, 1874, directing notice under seal of the court to be given to the claimants, requiring them to produce the invoice of the twenty-nine cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice: * * *" (p. 618).

The judgment of the Court upon this state of facts was as follows:

> "We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings" (p. 638).

It is difficult to see how any other judgment could have been rendered. This view of the case seems to have been taken in

Adams vs. *New York*, 192 U. S. 585, p. 598.

The element of search and seizure existed in the compulsory production of the invoice and its inspection by the District Attorney, and the element of self-incrimination in its admission in evidence by the Court.

However this may be, the opinion of the Court is a complete and authoritative exposition of the law upon searches and seizures. It must be remembered that Mr. Justice Gray, the learned author of the Appendix to Quincy's Reports, sat in the case. There can be no doubt that it settles what is a *reasonable* and what an *unreasonable* search and seizure. No later authorities have ventured to dispute its correctness in this regard. The permissible grounds of search and seizure are there stated. With respect to *papers* the Court says:

> "As before stated, the Act of 1863 was the first act in this country, and, we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, to enter into and search any suspected vaults, cellars or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining infor-

mation therein contained, or of using them as evidence against him. The two things differ *toto cælo*" (pp. 622, 623).

So also Lord Camden's judgment, quoted by him:

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of trespass, yet where private papers are removed and carried away the sacred nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect" pp. (627, 628).

The correctness of these observations has been recognized by the Court in *Hale* v. *Henkel*, 201 U. S., 43:

"We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by

such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union" (pp. 76, 77).

Ex parte Jackson, 96 U.S. 727. *Habeas corpus* to review conviction for using the mails for the purpose of a lottery. It did not appear from the record whether the prohibited circular was sealed or left open for examination. The Court held:

"Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers thus closed against inspection, wherever they may be."

IV.

While an arresting officer may, without warrant, seize stolen articles, or articles used as instruments of crime, when they are found upon the person of the accused, or are in plain view of the officer, it is an abuse of this right to search generally for evidence to be used against the accused.

In the foregoing pages have been noted all the reported cases where the search for and seizure by officers of *books and papers* upon making an arrest were directly in issue.

There are numerous cases, however, where articles of other descriptions have been seized, and it is worth while to cite a number of these in order to show wherein the right of the arresting officers to make seizures is limited.

Rex vs. *O'Donnell*, 7 C. & P., 138. Prisoner complained that his money had been taken from him on arrest. Patteson, J., in charging the jury, said:

> "If it is connected with the robbery, it is quite proper that it should be taken. But unless it is, it is not a fair thing to take away his money, which he might use for his defence. I believe constables are too much in the habit of taking away everything they find upon a prisoner, which is certainly not right."

Closson vs. *Morrison*, 47 N. H., 482. Trover against Sheriff. After arresting the prisoner on the charge of larceny defendant searched him and took from his person his money, watch, etc. The Court held it was a question of fact for the jury whether the search and seizure were reasonable; that it was the duty of an officer to search a person for dangerous weapons or tools or implements of escape.

O'Connor vs. *Bucklin*, 59 N. H., 589. Trespass for assault. An officer searched and took from the plaintiff his money. It was held that he might search the accused for money or other articles of value by means of which, if left in his possession, he might obtain tools or implements or weapons.

Banks vs. *Farwell*, 38 Mass., 156. It was held under the Massachusetts statute that a warrant for the arrest of an offender justified the seizure of the stolen property, described in the warrant, on his premises.

Sanford vs. *Nichols*, 13 Mass., 285. Trespass for break-

ing and entering. It was held that a warrant for the seizure of "goods, wares and merchandise" without specifying their character, etc., cannot be such a particular description as the Constitution requires.

Commonwealth vs. *Dana*, 43 Mass, 329. Held that lottery tickets were liable to seizure as belonging to the *corpus delicti*, or for the purpose of preventing any further violation of the law (at p. 337). It was there held that in any event, whether the seizure were legal or illegal, there was no ground for setting aside a conviction.

Ex parte Hurn, 92 Ala., 102, where money was removed from the prisoner. *Mandamus* denied.

Reifsnyder vs. *Lee*, 44 Ia., 101. The officer held justified in taking articles from the person of the suspect.

Stuart vs. *Harris*, 69 Ill. App., 668. An officer took from the person of the suspect, money, the fruits of his crime. Held justified.

Hebrew vs. *Pulis*, 73 N. J. Law, 621. Officer without a warrant held not entitled to strip the accused.

Gray vs. *Kimball*, 42 Me., 299. Liquors kept contrary to law were rightfully seized.

Houghton vs. *Bachman*, 47 Barb., 388, where property stolen was held rightfully seized under a warrant of arrest.

Getchell vs. *Page*, 103 Me. 387. Trespass for taking away chattels, viz.: cork stoppers, copper funnels, measures, bottles and mugs. The goods were taken in the execution of a warrant issued under a statute allowing the search for and seizure of liquors. It was held that the officer was justified in taking the articles in question, which were closely connected with the subject of the alleged crime.

A vast number of cases have arisen in this country on appeals from convictions where the defendant complained that property illegally taken by arresting officers had been used against him. Of course all these cases were, or should have been, decided in favor of the State, because the illegal seizures did not render the testimony inadmissible. For examples of these see:

Wigmore, Vol. 4, pp. 3124, 3125.

It is a noteworthy fact that among these numerous cases few can be found involving the seizure of papers, and but one of a search for papers on the private premises of the accused. Of the last class, *People* vs. *Adams*, 176 N. Y., 351, is an example. There the arresting officers seized a number of policy slips and also private papers of the defendant. The Court of Appeals intimated that the seizure of the private papers might be illegal, but held, correctly, that their use was no ground for reversing the judgment of conviction. That opinion was affirmed in this court in 192 U. S. 585.

It would be extraordinary if an officer had a right to do more without a warrant than he could with one. Insistence on particularity of description in the granting of warrants is in part due to the danger of investing arresting officers with discretionary powers. This danger was one of which the courts were early mindful; "and although the sheriff be an officer of great authority and trust, yet it appears, by experience, that the King's writs are served by bailiffs, persons of little or no value" (*Semayne's Case*, *supra*). And, of writs of assistance, it was said by Otis, they were destructive of liberty because they placed "the liberty of every man in the hands

of every petty officer." (Cooley, 428.) The power to search or seize must be limited by every possible safeguard. Its limits have thus been defined by Black in his work on Constitutional Law:

> "As a general rule, search warrants are to be employed only as an aid in the enforcement of the criminal laws. They may be issued for the recovery of goods alleged to have been stolen, for the discovery of merchandise smuggled into the country and concealed to avoid the payment of duties, for intoxicating liquors, kept or intended for sale in violation of law, for instruments and apparatus used in gambling, for seizure of lottery tickets or materials for drawing a lottery and for forged warrants, writs, certificates or other such legal documents . . . *Nor is this warrant ever allowed to be used solely as the means of obtaining evidence against a person accused of crime.* It is true that in some few cases, as in the search for stolen goods, the discovery of the article in question may furnish an item of evidence against the possessor of it. But in all such cases either the complainant or the public has some interest in the property or in its destruction, and the finding of evidence is not the immediate reason for issuing the warrant." (3d Ed., p. 613.) (Italics ours.)

Laws of England:

> "Except in the case of stolen goods there is no power at common law to issue a warrant authorizing the search of a house." (Citing Entick *vs.* Carrington, 19 How. St. Trials, 1030, at p. 1067). "But provision is made by statute for the issue of a search warrant in certain specified cases." (Vol. 9, p. 310.)

Thereupon are cited some forty or more statutes where such search warrants are allowed, *e. g.*, the Larceny Act;

Frauds by Workmen Act; Old Metal Dealers Act; Pawn Brokers Act; Army Act; Bread Act; Gold and Silver Wares Act; Coinage Offences Act; Public Health Act; Disorderly Houses Act.

Hawkins' Pleas of the Crown, Book 2, Chap. 13:

> "But I do not find any good authority that a Justice can justify sending a general warrant to search all suspected houses in general for stolen goods, as has been more fully shown in the tenth section." (Citing Entick *vs.* Carrington.)

So *Burns*, Justice of the Peace, 30th Ed., Vol. 5, Title "Warrant (Search)."

So *Hale's Pleas of the Crown*, 1st Amer. Ed., 1847:

> "By the statute of 1 R. III, Cap. 3, it is enacted that 'neither Sheriff nor other person shall take or seize the goods of any person arrested or imprisoned before he be convicted of the felony according to the law of England or before the goods be authorized lawfully forfeited, upon pain of forfeiting double the value of the goods so taken,' and yet I know not how it comes to pass the use of seizing of the goods of persons accused of felony, though imprisoned or not imprisoned, hath so far obtained notwithstanding this statute that it passeth for law and common practice." (Vol. 1, pp. 365, 366.)

The Government has sought an analogy in the right of arresting officers to seize articles such as revolvers, poison bottles, forged certificates, etc., found on the person of the accused, or in his immediate possession. Of course, no one pretends to dispute this right. But the books and papers of these defendants bear no analogy to such articles. They are, in the first place, in no sense instruments of the crime. The only instrument

of the defendants' crime was the alleged false entry sheet which reposed in the custom house. The books and papers of the defendants could not, in their nature, contain any instruments of crime. They could be nothing more than admissions. Secondly, the taking and use of these books and papers involved not only a *seizure*, but a *search*. They were not obvious evidence of guilt. A considerable search must have been needed by the deputy marshals to discover which were the set of books relating to the importing business and which to the selling business (the latter of which they left alone). Then the books would have to be searched diligently for days before the supposed admissions could be discovered in them. This much is clear from the fact that the officers took more than they needed, so that the District Attorney held himself bound to return a substantial portion of them. It is also admitted in the answer of the District Attorney that much diligent investigation into them would be required (fol. 14).

> "It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans."
>
> *In re Pacific Ry. Comm'n.*, 32 Fed. R. 241, at p. 251, (per Field, J.)

The scope of the Fourth Amendment has been well defined in the Brief of the Government in *Wilson* vs. *U. S.*, now pending in this court.

> "The immunity granted by the Constitution is purely personal. It marks the reaction against tor-

ture of every kind, mental as well as physical. When the prisoner stands mute there shall not be *peine forte et dure* to make him plead, but a plea of not guilty is entered for him, and without compulsion of his knowledge or information the accusation against him must be established. *There can be no inquisition by search either of his memory or of his memoranda.* But this is the extent of his right, and in the maintenance of this there is no wrong to others. To go beyond this is to sanction the suppression or destruction of evidence which may be given by witnesses other than himself or by papers other than his own.

"The case seems plain beyond cavil when records and documents of a distinctive public character are involved, *or articles like burglars' tools, counterfeit money, gambling paraphernalia, and other matériel of crime, or money, or property, the spoil of the thief or the embezzler.* The reason is that the possession is wrongful, and so not entitled to protection." (Italics ours.)

V.

There is no unwritten usage justifying the search for and seizure of books and papers by an arresting officer.

This is demonstrated by the absence of any considerable body of authority on the subject. It is a new practice, originating in the office of the District Attorney in New York with the case of *United States* vs. *Wilson*, 163 Fed., 338. That was a proceeding, by motion, as this, to compel the District Attorney to surrender certain papers. A trunk check had been found on the person of an arrested prisoner, and thereby the Government, by presenting the

check at the premises of the carrier, had obtained possession of the trunk and of the papers contained in it. The Judge denied the motion, misunderstanding, apparently, the effect of the Constitutional provision against unreasonable search and seizure. Believing that *Boyd* vs. *United States* was not a precedent on that clause of the Constitution, he would not allow even its reasoning to weigh with him in a situation where a question under the fourth amendment was appropriately raised. That decision was in 1908. It is significant that shortly after this, in 1910 (Stat. 1910, c. 216), the Government secured the repeal of Sec. 860 of the Revised Statutes, which had hitherto afforded a defendant some measure of protection against the use of papers abstracted from him.

That Statute provided as follows:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided,* That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

Not until the decision of the *United States* vs. *Wilson* and the repeal of Sec. 860 was the District Attorney in a position to profit by such a seizure as this. It is safe, therefore, to assume that the practice is of very recent origin.

The case of *Boyd* v. *U. S.* (*supra*) itself proves that

there was no such procedure known to district attorneys thirty years ago. If prosecuting officers could, by swearing out a warrant of arrest, thus obtain possession of all an accused's books and papers, why should the Government have taken the trouble to procure the Act of 1874 (declared unconstitutional in *Boyd* v. *U. S.*), and why was it found necessary to resort to that Act, rather than to make a simple arrest and seizure without warrant,—certainly a convenient and easy method of obtaining the same end, if it were constitutional?

With the experience of centuries there has been forged this chain to safeguard the rights of citizens. It is natural that prosecuting officers, against whom the protection has been devised, should be alert to discover some weak link in the chain. They believe that they have discovered that weak link in the right of arresting officers to seize evidences of crime.

But such an abuse of the Court's process is as old as the common law.

> "52. It is an abuse that gaolers or their superiors despoil prisoners and take from them other things besides their armour."
>
> *Mirror of Justices.* Selden Soc. VII, 160 (temp. circ. 1285).

In connection with the supposed usage, relied upon by the Government, Judge Cooley makes the following pregnant observation:

> "The scope of this work does not call for any discussion of the searches of private premises, and seizures of books and papers, which are made under the authority, or claim of authority, of the revenue

laws of the United States. Perhaps, under no other laws are such liberties taken by ministerial officers; and it would be surprising to find oppressive action on their part so often submitted to without legal contest, if the facilities they possess to embarrass, annoy, and obstruct the merchant in his business were not borne in mind."

Cooley Const. Lim., 7th ed., p. 429, n. 1.

VI.

The Court below had jurisdiction to order the surrender of the books and papers in question.

It is possibly true that if they had been seized by a thief or a stranger (as in the Jerome case, *supra*), and then handed to the District Attorney, defendants could not require their surrender; but the seizure was made by officers of the law in avowed reliance upon the court's own process. The books and papers were *in custodia legis* from the very beginning. A summary order from the Court was therefore justified.

Rex v. *Barnett*, 3 C. & P., 600.

Regina v. *Frost*, 9 C. & P., 129.

Respectfully submitted,

A. Leo Everett,

Of Counsel.

April, 1911.

WISE v. MILLS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 963. Argued April 24, 25, 1911.—Decided May 15, 1911.

The fact that a question under the Constitution is involved in an order requiring production of books and papers, does not establish that a constitutional question is involved in the order committing for contempt for refusing to comply with the order to produce. *Nelson* v. *United States*, 201 U. S. 92, distinguished, and *Alexander* v. *United States*, 201 U. S. 117, followed.

This court has no jurisdiction to review a judgment of the Circuit Court committing for contempt for failure to produce simply because the interlocutory order which appellant refused to obey involved a constitutional question; and, where it does not appear that the order disobeyed was so far *dehors* the authority of the court as to be void, the appeal from the order of commitment will be dismissed.

On February 20, 1911, an inspector of customs, before a commissioner of a Circuit Court of the United States, charged Lawrence H. Mills, Charles G. Mourraille and Emil S. Duflot with conspiring to defraud the United States of a portion of the customs duties upon certain merchandise imported by said parties, who were engaged in business in the city of New York, under the firm name of Mills & Duflot. It was charged that the object of the conspiracy was to be accomplished by presenting to the Collector of the Port of New York false and fraudulent invoices, and the commission of a specific overt act was alleged. Upon this charge a warrant issued for the arrest of the accused. On the same day a deputy marshal with an agent of the Department of Justice proceeded to the place of business of the firm and executed the warrant by arrest-

ing the accused. At the time this was done the officers took possession of and carried away a large number of commercial books and papers which were found in the store or office of the accused. On the same day also the grand jury presented the accused for conspiracy to defraud the United States of its customs revenues and they were also arrested under a bench warrant issued upon this indictment, and were arraigned and admitted to bail.

On February 23, 1911, Mills, Mourraille and Duflot in a petition filed in the Circuit Court recited the taking possession and carrying away by the officers of the books and papers as heretofore stated, and alleged that such books and papers "constituted substantially all the books and papers with which they are and have been for several years doing business." It was averred upon information and belief that the books and papers in question had been turned over to the United States District Attorney to be placed at the disposal of the grand jury. Averring that the seizure was unlawful and without warrant of authority, it was prayed that the marshal and the district attorney be notified and after hearing they be commanded to return the books and papers. The district attorney quite elaborately answered the petition, admitting that the books and papers had been seized and carried away as alleged, traversing the averment that they were all the books, admitting that they were in his possession, that he had used and was intending to use them for the purpose of procuring indictments for violations of the customs laws and averring that reasonable access to the books and papers had been allowed the parties. The answer besides stated other matters which it was deemed sustained the seizure and the retention of the books and papers.

After hearing, the court ordered the return of the books and papers. The reasons for this course were stated in an opinion which substantially, on a review of the decisions of this court, especially *Boyd* v. *United States*, 116 U. S.

616, and *Hale* v. *Henkel*, 201 U. S. 43, held that the constitutional rights of the parties had been violated by the taking possession of the books and papers as alleged. 185 Fed. Rep. 318. Thereupon the district attorney, who is the plaintiff in error, refused to obey the order of the court and stated his reasons for the refusal in an elaborate paper filed in the Circuit Court and styled "Statement of grounds of United States attorney's refusal to obey order." In such paper, after referring to the taking possession of the books and papers and making certain statements concerning the same, it was declared: "As to the direction of this court to turn over the other books and papers now in his possession and taken into custody at the time of the arrest of the defendants, said United States attorney is unwilling and respectfully refuses to comply with said order, and the grounds of his refusal to obey the said order are as follows: . . ." This was followed by eleven paragraphs, in which were recited the charge against the accused, the taking possession of the books and papers, the return of some of them to the accused, the retention of the balance by the district attorney, their use before the grand jury and the intention to use them further. Certain papers were annexed as part of the statement.

The district attorney persisting in his refusal, the court entered an order committing him for contempt. Thereupon this writ of error to the judgment of commitment for contempt was allowed by the circuit judge who ordered the commitment, and assignments of error were filed, concluding as follows: "Wherefore the said Henry A. Wise prays that the order and judgment of said Circuit Court of the United States for the Southern District of New York, adjudging him to be in contempt, may be reversed and that the said court may be directed to enter an order and judgment vacating and setting at naught the said order upon which the commitment and complaint was made."

The Solicitor General for plaintiff in error:

In executing a warrant of arrest upon a charge of crime the officer may at the time and place of making the arrest seize anything upon the person of the defendant or in his possession at that time and place which is evidence of the crime for which he is arrested, and, this being so, the district attorney was entitled to the possession of books and papers containing evidence of the crimes charged against the defendants Mills, Mourraille and Duflot, in the complaint under which they were arrested and which were taken from their possession at the time and place of their arrest; and his refusal to return them under the order of the court was a proper discharge of his duty as the prosecuting officer of the Government. 1 Bishop on Crim. Proc., § 210, Wharton, Crim. Pld. & Prac., 8th ed., § 60; *Dillon* v. *O'Brien*, 16 Cox Crim. Cas. 245; *Ex parte Hurn*, 92 Alabama, 102; *Getchell* v. *Page*, 103 Maine, 387; *Smith* v. *Jerome*, 47 Misc. (N. Y.) 22; *State* v. *Robbins*, 124 Indiana, 308; *Reifsnyder* v. *Lee*, 44 Iowa, 101; *Closson* v. *Morrison*, 47 N. H. 482; *Spalding* v. *Preston*, 21 Vermont, 9; *United States* v. *Wilson*, 163 Fed. Rep. 338.

Mr. A. Leo Everett for defendant in error:

As to the jurisdiction of this court: There is no jurisdiction by appeal. That may be brought only pursuant to §§ 763 *et seq.*, Rev. Stat., which were limited but not repealed by the act of March 3, 1891. *Craemer* v. *The State*, 168 U. S. 124; *Rice* v. *Ames*, 180 U. S. 371; *Fisher* v. *Baker*, 203 U. S. 174; Notes to U. S. Comp. Stat., § 764.

The district attorney here is not restrained of his liberty in violation of the Constitution. While the Constitution provides immunity from unreasonable searches and seizures, it does not grant any right to officers of the law to make reasonable searches and seizures. It seems clear that such a right could be limited or controlled by law-making bodies, or even judges, without infringing on

a district attorney's or police officer's constitutional rights.

The act of March 10, 1908, c. 76, did not give the party aggrieved any greater rights by reason of the allowing of the certificate by a judge of the Circuit Court. Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions. *Harlan* v. *McGourin*, 218 U. S. 448.

The proceedings below cannot be reviewed in this court by writ of error. This writ is based upon the order adjudging the district attorney in contempt for disobedience to the order requiring him to surrender the books and papers. The original order was not a final order within the meaning of the decisions of this court. The requisite finality was obtained by the order adjudging him in contempt. *Nelson* v. *United States*, 201 U. S. 92; *Alexander* v. *United States*, 201 U. S. 117.

It does not follow, because finality can be obtained in this way, that every decision involving a constitutional question can thus be reviewed.

In this case, the Circuit Judge had complete jurisdiction over his own process and over the district attorney as an officer of his court. He had jurisdiction to compel obedience to his first order even though that may have been improvidently issued or issued upon an erroneous theory of constitutional interpretation. The vice, therefore, if any, in his original order would not inhere in the order adjudging the district attorney in contempt. It is the latter order, only, which is here for review.

MR. CHIEF JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

We have difficulty in understanding upon what theory the writ of error direct from this court was prosecuted, as clearly there was no jurisdiction to allow it, unless the case is within some of the provisions of the Judiciary Act

of 1891, conferring authority to so directly review. The only ground stated in the assignments of error which in the remotest degree refers to a matter which would come within our right to review is the third assignment, which asserts: "The court erred in adjudging that the taking into custody of said books and papers at the time of the lawful arrest of said Lawrence H. Mills, Charles G. Mourraille and Emil S. Duflot was in violation of the provisions of the Constitution of the United States." And this, we assume, is the theory upon which it is deemed we have jurisdiction directly to review, since that is the subject elaborately discussed in the argument at bar on behalf of plaintiff in error. But it is obvious on the face of the record that the error thus assigned and the discussion at bar in regard to it concern themselves, not with the order which it is sought to review, that is, the commitment for contempt, but to another and different order not final in its character, that is, the order of the court directing the return of the books and papers. *Alexander* v. *United States*, 201 U. S. 117. Even then, although it be conceded that a question under the Constitution of the United States was involved in the latter, that concession does not establish that a constitutional question was involved in the order committing for contempt. No conceivable constitutional right of the district attorney arose or could have been involved in committing him for contempt for refusing to obey the order of the court, and, therefore, there is no question presented on this record justifying a direct review of the order committing for contempt.

The case here is not even analogous to *Nelson* v. *United States*, 201 U. S. 92, since there the facts were these: A person who as a witness before a special examiner refused to produce books and papers on the ground that to compel him to do so would invade his constitutional rights, was proceeded against for contempt and the authority of this court to directly review the final judgment committing for

contempt was rested upon the express ground that the writ of error directly involved the determination of whether the order to produce, and to punish for the refusal to produce, violated the constitutional rights of the witness. Even if it were to be conceded, for the sake of argument, that the court below had proceeded upon an erroneous conception of the Constitution when it ordered the return of the books and papers, that concession would not serve to establish that the order was so *dehors* the authority of the court as to cause it to be void, and to justify an officer of the court in refusing to respect and obey it. This is obviously true, since it is apparent that, wholly irrespective of the merits of the view which the court took of the constitutional rights of the parties whose books and papers were directed to be returned, the power to direct the return of the books and papers was equally possessed and might have been exerted upon the conception of the abuse of discretion, which was manifested by the taking possession of the books and papers under the circumstances disclosed. Indeed, the basis upon which the assumption that we have jurisdiction to review rests plainly upon a two-fold misconception. The one, that the right to have a direct review of the final contempt order carries with it the right to have at the same time a review of the interlocutory order returning the books—a proposition which directly conflicts with the ruling in the *Alexander Case, supra.* The other, because, under the view taken by the court below, the seizure of the books and papers violated the constitutional rights of the accused—that, therefore, some constitutional question was involved in the commitment for contempt for refusing to obey the order of the court for the return of the books and papers.

Under the circumstances we are of opinion that the entire want of foundation for the assumption that there was jurisdiction in this court to directly review the order of commitment which caused this writ of error to be prose-

cuted is, we think, so obvious as not to afford any possible ground for retaining jurisdiction of the cause. That is to say, we are of opinion that the contention upon which the asserted right to prosecute the error directly to this court was based is so devoid of all foundation as to render it necessary to decline to assume a jurisdiction which we have not; and, therefore, the writ of error is dismissed.

Writ of error dismissed.

WISE, INDIVIDUALLY AND AS UNITED STATES ATTORNEY, *v.* HENKEL, UNITED STATES MARSHAL IN NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 964. Argued April 24, 25, 1911.—Decided May 15, 1911.

Where the court below had authority to make an order directing the performance of an act, irrespective of a constitutional question raised, the denial of a writ of *habeas corpus* on behalf of one committed for contempt for refusing to obey such order does not necessarily involve the construction or application of the Constitution and a direct appeal from the judgment denying the writ does not lie to this court under § 5 of the Judiciary Act of 1891.

The writ of *habeas corpus* cannot be made to perform the functions of a writ of error.

THE facts, which involve the jurisdiction of this court on appeal from a judgment of the Circuit Court of the United States in a *habeas corpus* proceeding, are stated in the opinion.

The Solicitor General for appellant.

Mr. A. Leo Everett for appellee.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is disposed of by the opinion delivered in *Wise* v. *Mills*, just decided, *ante*, p. 549. It thus arose:

The district attorney on his committal for contempt in refusing to obey the order directing him to return certain books and papers, on being taken into custody sued out a writ of *habeas corpus*, and from the judgment discharging the writ prosecuted this appeal The petition in *habeas corpus* after averring the facts as we have stated them in the opinion in *Wise* v. *Mills*, alleged that the commitment for contempt was based "solely and exclusively on an order of this court made and filed on the 15th day of March," and that the court "was without jurisdiction to compel your petitioner as United States Attorney for this district or in any other capacity to surrender to the persons now under indictment and awaiting trial . . . books and papers which came into his lawful and official custody as aforesaid and are necessary to a prosecution still pending against said defendants." It was then averred that "your petitioner verily believes that for the reasons above stated the order adjudging him guilty of contempt and his commitment pursuant to said order in the custody of the marshal were without legal right, authority or jurisdiction of any kind and are utterly void and ineffective, and that his detention and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges and immunities thereunder."

The right to come directly to this court is controlled by § 5 of the Judiciary Act of 1891, which authorizes an appeal in certain cases. It is plain that the only portion of that subdivision which can possibly have application here is that which relates to cases "involving the construction or application of the Constitution of the United States."

But, as we have seen in *Wise* v. *Mills*, no question as to the construction or application of the Constitution of the United States, in the correct sense of those words, was involved in the order committing for contempt. While it is true that the court, in passing upon the application for the return of the books and papers, expressed the opinion that as the act of seizing them violated the constitutional rights of the petitioners they were entitled to an order for return, this did not cause it to come to pass that the order committing for contempt involved the application or construction of the Constitution. In every aspect this is the case, since the authority of the court to consider and decide the application for the return of the books and papers existed wholly irrespective of whether there was a constitutional right to exact the return of the books and papers. That is to say, it was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court. The case, therefore, is but an attempt to cause a writ of *habeas corpus* to serve the functions of a writ of error.

For the reasons stated in case of *Wise* v. *Mills*, we think the contention that a constitutional question was involved in this case upon the existence of which the right to appeal to this court depended, is so wholly devoid of merit as to require here, as it did in the other case, a dismissal for want of jurisdiction. The appeal is, therefore,

Dismissed for want of jurisdiction.